BENCH HANDBOOK

THE INDIAN CHILD WELFARE ACT

Preface

Presiding over dependency or delinquency or other child custody cases involving Indian children can be one of the most rewarding assignments in juvenile or family courts. It can also be challenging because you are dealing not only with the best interests of the Indian child and the parents, but also with the interests of the tribe, separate from both parent and child. The sense of accomplishment when the resources of a tribe both financial and emotional are used to reunify a child with parent or provide an alternative living arrangement and to connect the child with a tribe and tradition, is like no other. This Bench Handbook is intended to help navigate the challenges of notice and compliance to enable you to get the more rewarding part sooner and more frequently.

In 1978 Congress passed the Indian Child Welfare Act (ICWA). It was intended as a federal mandate to those involved in the child custody system to work collaboratively with tribes to prevent the break up of Indian families and tribes and to redress past wrongs of the American child custody system. Congress found, "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and Institutions." (25 USC §1901 (4))

Even though the ICWA was passed in 1978, compliance is still problematic in many respects. Failure to comply with procedural requirements such as notice to the tribes and BIA result in some of the frustration courts have found. Beyond the procedural and notice requirements, the ICWA provides substantive requirements, which are meant to implement the corrective intent of the ICWA. Crucial to the premise of the act is that these substantive requirements are intended to protect the tribes. The U.S. Supreme Court stated that, "[t]he numerous prerogatives accorded the tribes through the ICWA's substantive provisions...must be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 49; 109 S Ct 1597; 104 L Ed 2d 29. Children are essential to the survival of tribe as the only means of transmitting tribal heritage. (Hearing on S.1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong. 2nd Sess. (1978)).

California has a unique historical landscape when it comes to Indian legal and political policy. California is home to over one hundred federally recognized tribes. It is second only to Alaska in the number of tribes represented in the state. The number of tribes represented in California happened in part because California was a relocation destination. When the BIA moved Indian people off of reservations outside of the state it moved them to the major cities in California in the Bay Area and Los Angeles in the hopes that the Indians would remain there and gradually blend into the "melting pot". The BIA moved 60, 000 to 70,000 out of state Indians into these relocation centers. As a result of this assimilation effort, California now has more Indians living here than any other state and the number of Indians from out of state tribes exceeds the number of Indians from California federally recognized tribes. This geometrically complicates the process of tracking Indian tribes to which notice must be given and probably accounts for the large number of Indians living in California who know they are Indian, and may know their tribe, but know little more than that about their Indian heritage.

The cultural benefits associated with preventing the break up of Indian families and tribes are well-documented and were the driving force behind the act. What is not always highlighted are the more tangible benefits that are available to many children through their relationship with their tribe. Many tribes have revenue from some source that benefits the tribal community. In California, the most familiar source is the revenue some tribes enjoy from gaming, but tribes also have revenue from natural resources such as timber, mining or fishing or other business enterprises. This revenue benefits tribal members in many ways. Some tribes have direct services for Indian children and families in need such as alcohol and drug treatment programs, health clinics, or after school programs. Other tribes may also be able to provide payments of a portion of their revenue directly to tribal members by way of per capita payments. Having these additional resources available in ICWA cases is a tangible benefit to the Indian children involved as they can be used in designing a culturally appropriate and hopefully successful case plan.

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INTRODUCTION

The primary objective of this Bench Handbook is to provide a substantive and procedural overview of the Indian Child Welfare Act (ICWA) (25 USC §§1901–1923), as it applies to child custody proceedings in California. In any juvenile court dependency proceeding under Welf & I C §§300 et seq or delinquency proceeding under Welf & I C §601 or §602, in any voluntary adoption proceeding, or probate or other legal guardianship proceeding in which the child involved may possibly be an Indian child, the court *must* consider the applicability of the ICWA to the proceeding.

This Handbook is divided into five chapters. The first chapter discusses when the ICWA applies. The second chapter provides detailed coverage of the ICWA's notice requirements, because a failure to comply with these requirements generally constitutes prejudicial error. The third chapter covers proceedings in dependency and delinquency proceedings after notice has been given, including the appointment of counsel for the child and the child's parents, intervention in the proceeding by the child's tribe, the requirement that active remedial efforts be undertaken to prevent the breakup of the Indian family, and the heightened burden of proof imposed by the ICWA for a foster care placement or termination of parental rights involving an Indian child. The fourth chapter covers voluntary adoption proceedings, including the parental consent requirements imposed by the ICWA. The final chapter discusses the ICWA's placement preferences, when a court may depart from these preferences, and other procedures that apply following the placement of an Indian child.

Chapter 1

THE INDIAN CHILD WELFARE ACT (ICWA)

I. [§1.1] WHAT IS THE ICWA?

Congress passed the Indian Child Welfare Act (ICWA) (25 USC §§1901–1923) in 1978 to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing specific standards that must be met before an Indian child may be removed from his or her family or placed in an adoptive or foster care placement. See 25 USC §§1901–1902; *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 32–37, 109 S Ct 1597, 104 L Ed 2d 29. Congress was concerned about the high rate of Indian children being removed from their families and placed in non-Indian homes and the negative consequences this practice had on Indian children, families, and tribes. See 490 US at 32.

The ICWA acknowledges the special relationship between tribes and the federal government. Federal recognition means that a tribe is formally recognized as a sovereign entity with a government-to-government relationship. An Indian child belonging to a federally recognized tribe is a citizen of that tribe (see *Morton v Mancari* (1974) 417 US 535, 554 n24), and ICWA protects the child's interest in his or her tribe and the benefits that flow from citizenship of that tribe. See 25 USC §§1901–1902.

The ICWA establishes minimum federal standards, both procedural and substantive, that govern the removal of Indian children from their families and subsequent placement in foster or adoptive homes. *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 641, 19 CR3d 155. Under the ICWA, there is a presumption that it is in the best interests of an Indian child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations. *In re Desiree F.* (2000) 83 CA4th 460, 469, 99 CR2d 688.

A child custody proceeding involving an Indian child is the same as any child custody proceeding in general except that under the ICWA, you must not only consider the child's interests but also consider the interests of the child's Indian tribe. *In re Crystal K.* (1990) 226 CA3d 655, 661, 276 CR 619. Under the ICWA, a child's tribe has rights that are independent of the rights of the child and the child's parents, so that the tribe may protect its interests. *In re Kahlen W.* (1991) 233 CA3d 1414, 1425, 285 CR 507. See §1.5.

The Bureau of Indian Affairs (BIA) has issued Guidelines (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979)) for courts to consider in applying the ICWA. The Guidelines provide that the ICWA, the Guidelines themselves, and any state statutes and regulations designed to implement the ICWA should be liberally construed in favor of a result that is consistent with the congressional preference of deferring to tribal judgment on matters concerning Indian children. 44 Fed Reg 67586. Although these Guidelines are not binding, "the construction of a statute by the executive department charged with its administration is entitled to great weight." *In re Desiree F.* (2000) 83 CA4th 460, 474, citing *In re Krystle D.* (1994) 30 CA4th 1778, 1801 n7.

Because the ICWA establishes only minimum federal standards (25 USC §1902), the Guidelines provide that state laws may offer broader protections than the ICWA, if these laws do not infringe on rights afforded by the ICWA. 44 Fed Reg 67586. Under the ICWA, a court may apply a state or other federal law to a child custody proceeding involving an Indian child if that law provides a higher standard of protection to the rights of the child or the child's parents or Indian custodian than that provided by the ICWA. 25 USC §1921.

California law also recognizes that (Fam C §7810(a); Welf & I C §360.6(a)):

- No resource is more vital to the continued existence and integrity of an Indian tribe than its children,
- California has an interest in protecting Indian children who are members of or eligible for membership in an Indian tribe, and
- It is in the interest of an Indian child that the child's membership in his or her tribe and connection to the tribal community be encouraged and protected.

In all Indian child custody proceedings, as defined in the ICWA, you must (Fam C §7810(b); Welf & I C §360.6(b)):

- Consider these legislative findings,
- Strive to promote the stability and security of Indian tribes and families,
- Comply with the ICWA, and
- Seek to protect the child's best interests.

II. WHEN DOES THE ICWA APPLY?

A. [§1.2] PROCEEDINGS COVERED BY ICWA

The ICWA (25 USC §§1901–1923) applies to child custody proceedings when an Indian child is involved and includes (25 USC §1903(1)):

- *Foster care placement*, arising in dependency or delinquency. 25 USC §1903(1)(i); Cal Rules of Ct 1499; *In re Jennifer A.* (2002) 103 CA4th 692, 699–701, 127 CR2d 54

(ICWA applies to involuntary proceeding that might result in temporary foster home placement of possible Indian child).

- *Probate and juvenile court guardianships*, which is any guardianship over the person when the parent or Indian custodian cannot have the child returned upon demand. 25 USC §1903(1)(i).
- *Termination of parental rights*, which is any action that arises in dependency (Welf & I C §366.26), delinquency (Welf & I C §727.31), or private adoption (Fam C §8606):
  - A proceeding to terminate one parent's right by the other parent under Fam C §§7800–7895 is a "child custody proceeding" within the meaning of the ICWA. *In re Suzanna L.* (2002) 104 CA4th 223, 229, 127 CR2d 860.
  - An adoption proceeding in which the parent's consent is unnecessary under Fam C §8606 is included within the ICWA's definition of termination of parental rights. *Adoption of Lindsay C.* (1991) 229 CA3d 404, 407–409, 280 CR 194.
- *Preadoptive placement*, which is the temporary placement of an Indian child in a foster home or institution after termination of parental rights, but before or in place of adoption.
- *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action that results in a final decree of adoption.
- *Certain juvenile delinquency proceedings,* which result in the termination of a parental relationship, or that involve a status offense that an adult could not commit, such as truancy or curfew violations. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.3(a). These include (Cal Rules of Ct 1439(b)):
  - Proceedings under Welf & I C §§601 et seq for habitual truancy or curfew violations, or for a refusal to obey the reasonable and proper orders of a parent, guardian, or custodian; and
  - Proceedings under Welf & I C §§602 et seq to adjudge a minor to be a ward of the court, in which the child is at risk of entering foster care or is in foster care.

A juvenile court dependency proceeding under Welf & I C §§300 et seq is a child custody proceeding within the meaning of the ICWA because it may result in foster care placement, termination of parental rights, or preadoptive or adoptive placement. *In re Wanomi P.* (1989) 216 CA3d 156, 165–166, 264 CR 623. See Cal Rules of Ct 1439(b); but see *In re S.B.* (2005) 130 CA4th 1148, 1163, 30 CR3d 726, which suggests that the ICWA may not apply to detention hearings in emergency situations. See discussion of jurisdiction in emergency placements at §1.12.

Although the common element in proceedings covered by the ICWA is loss of parental control over the child, the ICWA applies to voluntary, as well as involuntary, proceedings. For example, the ICWA applies to a non-Indian adoption placement that is voluntarily sought by an Indian child's biological parents. See *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 51–53, 109 S Ct 1597, 104 L Ed 2d 29. See chap 4. Different provisions of the ICWA apply depending on whether the proceeding is voluntary or involuntary. See, *e.g.*, 25 USC §§1912(a) (notice in involuntary proceeding for foster care placement or termination of parental rights), 1913(a) (voluntary consent to foster care placement or termination of parental rights).

The ICWA does not apply to:

- *Juvenile delinquency proceedings*, except for those proceedings noted above. Cal Rules of Ct 1439(b).
- *Child custody disputes* arising out of dissolution or legal separation proceedings, as long as custody is awarded to one of the parents. 25 USC §1903(1). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.3(b); *In re Jennifer A.*, *supra*, 103 CA4th at 701 (ICWA does not apply unless custody is being taken from both parents). However, if the custodial parent remarries and files a proceeding to terminate the parental rights of the noncustodial Indian parent to permit a stepparent adoption or other third-party custody, the ICWA applies to this proceeding. See *In re Crystal K.* (1990) 226 CA3d 655, 657–666, 276 CR 619.
- *Voluntary placements* that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.3(c).

B. [§1.3] CHILDREN COVERED BY ICWA

The ICWA defines "Indian Child" as any unmarried person under 18 years of age who is either (25 USC §1903(4); Cal Rules of Ct 1439(a)(1)):

- A member of a federally recognized Indian tribe (25 USC §1903(8)), or
- Eligible for membership in such a tribe and is the biological child of a tribal member.

> TIP: You should spend some time in court correctly identifying the party's relationship to the child. If the child may derive tribal membership through the father, and if the child is then adopted, ICWA applies, but if the father is alleged and not present, then ICWA may not apply. Because there's no definition of acknowledgment, some judicial officers will take the statement of the mother and alleged paternal grandparents, who are present and confirm their belief in the paternity of the child, to establish biology and trigger the ICWA.

Recognized Indian tribes are listed annually in the Federal Register. See 25 CFR §83.6(b). See *In re Desiree F.* (2000) 83 CA4th 460, 476, 99 CR2d 688 (ICWA applies to Alaskan native tribes). The BIA compiles a list of recognized tribes, which by its own admission, however, is not always up to date. A more current source for recognized tribes is www.childsworld.ca.gov/res/pdf/alphatribe.doc.

You are not required to apply the ICWA if the tribe is not recognized by the federal government. 22 Cal Code Reg §35355(a)(2). See *In re Wanomi P.* (1989) 216 CA3d 156, 166–168, 264 CR 623 (ICWA did not apply because mother's Canadian tribe was not recognized by U.S. government). Similarly, you are not required to apply the ICWA if a child who has some Indian ancestry is not, for whatever reason, a member or eligible to be a member of a tribe.

TIP: You have the authority to (and many judges do in "heritage cases") apply the ICWA more broadly in keeping with the spirit of the Act to promote Indian tribes and families. A side benefit of applying ICWA broadly is that if a child is later determined to come within the ICWA definition of an Indian child, your order will not be reversed for failure to apply the ICWA.

C. EXISTING INDIAN FAMILY DOCTRINE

1. [§1.4] What Is It?

The existing Indian family doctrine is a controversial judicially created limitation on the applicability of the ICWA. The controversy derives from the split of authority among the appellate courts as to whether the doctrine applies and a legislative attempt to override it.

The doctrine essentially provides that the ICWA applies only to children who are of Indian descent and belong to an "existing Indian family." *In re Bridget R.* (1996) 41 CA4th 1483, 1491, 49 CR2d 507. It has been recognized by some courts and rejected by others. *In re Alexandria Y.* (1996) 45 CA4th 1483, 1488, 53 CR2d 679 (noting split of authority on this issue both nationally and in California).

Existing Indian family means the Indian child or at least one of the child's parents has a significant social, cultural, or political relationship with Indian life. *In re Alexandria Y., supra,* 45 CA4th at 1488. See *In re Derek W.* (1999) 73 CA4th 828, 833, 86 CR2d 742 (finding as a matter of law that there was no "existing Indian family," when the father provided no evidence he was part of an existing Indian family or that he had provided such a family to the child).

The doctrine may apply in both voluntary adoption proceedings initiated by one or both parents, as well as in dependency proceedings, particularly when services have been provided and have been unsuccessful, and it appears that the family will not be reunited. *Crystal R. v Superior Court* (1997) 59 CA4th 703, 723–724, 69 CR2d 414.

TIP/CAUTION: Even if you apply the existing Indian family doctrine, the notice requirements of the ICWA (see chap 2) must be followed. Giving notice does not take the child out of his or her existing placement and permits the tribe to be heard on the issue of whether the child, in fact, has an "existing Indian family." *In re Suzanna L.* (2002) 104 CA4th 223, 234–237, 127 CR2d 860. That determination will govern whether the provisions of the Act are applicable.

2. [§1.5] Statutory Approach

In 1999, the Legislature enacted two statutory provisions to provide a statutory presumption of political affiliation that would satisfy the requirements of the existing Indian family doctrine in California. These provisions state that a determination by an Indian tribe that an unmarried person who is under 18 years of age and who is either a member of an Indian tribe or eligible for membership and is a biological child of a tribal member constitutes a significant political affiliation with the tribe and requires the application of the ICWA to the proceedings. See Fam C §7810(c) (applying to proceedings to declare minor child free from parental custody and control); Welf & I C §360.6(c) (applying to juvenile court proceedings). Although the statutory presumption generally satisfies the requirements of the existing Indian family doctrine, some appellate court decisions have reformulated the doctrine as a federal constitutional limitation on the application of the ICWA, which is not necessarily satisfied by presumption under Welf & I C

§360.6(c). *In re Santos Y.* (2001) 92 CA4th 1274, 1312–1323, 112 CR2d 692; *In re Suzanna L.* (2002) 104 CA4th 223, 234, 127 CR2d 860. See discussion at §1.7.

3. [§1.6] Appellate Rejection of Doctrine

The First and Fifth Appellate Districts of the Court of Appeal have rejected the existing Indian family doctrine on two grounds: (1) it is not needed to protect the family rights of Indian children because the ICWA permits a court to depart from its statutory placement preferences when good cause exists to do so (25 USC §1915(a); see §5.8), and (2) the doctrine conflicts with the ICWA's policy of protecting and preserving the interests of Indian tribes in their children. See *Adoption of Lindsay C.* (1991) 229 CA3d 404, 414–416, 280 CR 194 ("[l]imiting the Act's applicability solely to situations where nonfamily entities physically remove Indian children from actual Indian dwellings deprecates the very links-parental, tribal and cultural-the Act is designed to preserve"); see also *In re Junious* (1983) 144 CA3d 786, 193 CR 40. A final ground the courts have relied on is that the doctrine undermines the ICWA's purpose of establishing uniform federal standards governing the removal of Indian children from their families. *In re Alicia S.* (1998) 65 CA4th 79, 89, 76 CR2d 121.

4. [§1.7] Appellate Support for Doctrine

The existing Indian family doctrine has been held to be a federal constitutional limitation on the ICWA. *In re Santos Y.* (2001) 92 CA4th 1274, 1306–1323, 112 CR2d 692; *In re Bridget R.* (1996) 41 CA4th 1483, 1501–1512, 49 CR2d 507; see also *In re Alexandria Y.* (1996) 45 CA4th 1483, 1488, 53 CR2d 679; *In re Crystal R.* (1997) 59 CA4th 703, 720, 69 CR2d 414. Under the appellate courts' reasoning, applying the ICWA to a child who does not have an existing Indian family is unconstitutional in three different respects:

(1) It violates substantive due process, because it deprives the child of the fundamental right to a stable and existing relationship with his or her de facto family without serving the governmental purposes of the ICWA. *In re Santos Y., supra,* 92 CA4th at 1306–1307, 1314–1317; *In re Bridget R., supra,* 41 CA4th at 1502–1508.

(2) It violates equal protection, because it treats Indian children differently based solely on race, rather than on the child's social, cultural, or political affiliation with a tribe. *In re Santos Y., supra,* 92 CA4th at 1307–1308, 1317–1322; *In re Bridget R., supra,* 41 CA4th at 1508–1510.

(3) It violates the Tenth Amendment, because jurisdiction over family relationships is traditionally reserved to the states, and there is no substantial nexus between the power of Congress under the Indian commerce clause and custody proceedings involving children who do not have a significant relationship to Indian culture. *In re Santos Y., supra,* 92 CA4th at 1308–1309, 1322–1323 (finding application of placement preference of ICWA (25 USC §1915(a)) was unconstitutional under doctrine); *In re Bridget R., supra,* 41 CA4th at 1510–1511 (finding application of voluntary relinquishment standards of ICWA (25 USC §1913(a)) was unconstitutional under doctrine).

The doctrine provides that the purpose of the ICWA is not furthered by applying the ICWA to families who are of Indian descent, but who maintain no significant social, cultural, or political relationships with Indian community life, and who are in all respects indistinguishable from other residents of the state. 41 CA4th at 1511–1512.

TIP: If you apply this doctrine, you must first determine whether there is an existing Indian family, which under the doctrine is a fundamental determination to be made before applying the ICWA. *In re Bridget R.* (1996) 41 CA4th 1483, 1512, 49 CR2d 507. Although the parents and the tribe may bear the burden of proof on this issue, a connection is statutorily presumed, and the ICWA must be applied if the child meets the ICWA definition of an Indian child. See Welf & I C 360.6(c); Fam C §7810(c) and discussion at §1.5. Remember, even if you apply the doctrine, it does not operate to waive notice to tribes and the BIA if there is evidence that a child may have Indian ancestry.

III. [§1.8] WHAT PROCEDURAL SAFEGUARDS ARE CONTAINED IN ICWA?

The ICWA contains a number of significant procedural safeguards for Indian tribes in custody proceedings involving Indian children and for the parents of these children, including the following:

- The courts and agencies are required to inquire as to a child's Indian ancestry and provide notice (see chap 2) to ensure that the ICWA is applied to all Indian children subject to proceedings covered by the Act.
- The child's tribe may assert jurisdiction over the proceeding or intervene at any time in a state court proceeding. 25 USC §1911(a)–(c). See §§1.6–1.7, 3.2, 4.5.
- Full faith and credit must be given to tribal court custody decisions. 25 USC §1911(d). This full faith and credit provision does not require a state court to apply a tribe's law in violation of the state's legitimate policy, nor does it empower a tribe to control the outcome of state court proceedings. If a tribe wishes to assert its own law with respect to an Indian child's placement, it may do so by exercising its jurisdiction under 25 USC §1911(b). See *In re Laura F.* (2000) 83 CA4th 583, 590–595, 99 CR2d 859.
- Both the tribe and the child's parents must be given notice of pending custody proceedings. 25 USC §1912(a). See chap 2.
- Indigent parents have a right to have appointed counsel represent them in involuntary custody proceedings. 25 USC §1912(b). See §3.3.
- A high standard of proof is required to remove an Indian child from his or her parents or Indian custodian or for termination of an Indian parent's parental rights. 25 USC §1912(e), (f). See §§3.21–3.23.
- Statutory preference to placement of Indian children with Indian families or other tribal members is given. 25 USC §1915. See chap 5.
- Validity of an Indian parent's consent to foster care placement, termination of parental rights, and adoption must meet specific requirements. 25 USC §1913(a)–(c). See §4.1.
- State court proceedings that do not comply with the ICWA may be invalidated by a court of competent jurisdiction. 25 USC §1914. See §5.14.

IV. WHO HAS JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS?

A. [§1.9] DUAL TRIBAL AND STATE JURISDICTION

The ICWA provides for a system of dual state and tribal jurisdiction over Indian child custody proceedings. In general a tribal court has exclusive jurisdiction over proceedings involving Indian children who

- Reside or are domiciled on the tribe's reservation, or
- Are wards of the tribal court, even if they do not reside or are not domiciled on the reservation. 25 USC §1911(a).

But Congress has delegated to some states, including California, partial civil jurisdiction over Indian reservations located within the state's borders. See 28 USC §1360(a). This provision divests tribes in California of their exclusive jurisdiction under the ICWA. *Doe v Mann* (9th Cir 2005) 415 F3d 1038, 1060 (California dependency proceedings come within Pub L 280's delegation of civil jurisdiction to California); see 25 USC §§1911(a), 1918(a).

Currently, only the Washoe Tribe of Nevada and California is authorized under the ICWA to exercise exclusive jurisdiction in California. Cal Rules of Ct 1439, advisory committee comment. But Indian children of tribes located outside of California and who are entitled to exclusive jurisdiction may appear in California courts. The Federal Register publishes notice of the Secretary's approval or disapproval of a tribe's plan for reassumption of exclusive jurisdiction. See 25 USC §1918(c); 25 CFR §13.14(a)(2), (3).

When an Indian child, who resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody proceedings, has been removed by a state or local authority from the custody of his or her parents or Indian custodian, this authority must provide notice of the removal to the tribe no later than the next working day following the removal. Welf & I C §305.5(a). It must also provide all relevant documentation to the tribe regarding the child's identity and removal. If the tribe determines that the child is an "Indian child," the state or local authority must transfer the child custody proceeding to the tribe within 24 hours of receiving written notice from the tribe of its determination. Welf & I C §305.5(a).

> TIP: The jurisdiction issue is hardly ever raised in court. Usually it is enough to check the list for federally recognized tribes and only deal with jurisdiction if the tribe raises it as an issue.

B. [§1.10] WHEN STATE COURTS HAVE CONCURRENT JURISDICTION WITH TRIBAL COURT

When an Indian child is not domiciled or residing on the reservation, the tribal court does not have exclusive jurisdiction, and a state court may exercise jurisdiction over the proceeding. 25 USC §1911(a), (b). However, on petition by either parent, the child's Indian custodian, or the child's tribe, the state court must transfer the proceeding to the jurisdiction of the tribal court unless "good cause" exists not to transfer the proceeding, either parent objects to the transfer, or the tribal court declines jurisdiction. 25 USC §1911(b). See Cal Rules of Ct 1439(c)(2). This provision of the ICWA gives a parent the absolute right to veto a transfer of jurisdiction. *In re Larissa G.* (1996) 43 CA4th 505, 510–515, 51 CR2d 16.

TIP: Good cause for not transferring a proceeding may be raised by minor's counsel or the court itself.

The BIA Guidelines specify that any request to transfer the proceeding must be made promptly after receiving notice of the proceeding. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §C.1. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to a tribal court and be retried, good cause exists to deny the request. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §C.1 Commentary. See also *In re Robert T.* (1988) 200 CA3d 657, 664, 246 CR 168 (tribe's motion to transfer, made five months after receiving notice of proceedings, was untimely).

The BIA Guidelines also set forth other circumstances that constitute good cause not to transfer the proceeding (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §C.3(b)):

- The Indian child is over 12 years old and objects to the transfer.
- The evidence necessary to decide the case cannot be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- The parents of a child over 5 years old are not available, and the child has had little or no contact with the child's tribe or tribal members.

You must ensure that the tribal court is notified, in writing, of any proposed transfer and must give the tribal court at least 20 days from receipt of the notice to decide whether to accept or decline the transfer. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §C.4(b). If the case is transferred, you should provide the tribal court with all available information on the case. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §C.4(d).

If the tribal court does not request a transfer of the proceeding to tribal jurisdiction and the tribe does not intervene, you may proceed to exercise jurisdiction regarding the Indian child under Welf & I §§300 et seq, in accordance with the procedures and standards of proof required by both juvenile court law and the ICWA. Cal Rules of Ct 1439(c)(3).

C. [§1.11] DETERMINING JURISDICTION

In any Indian child custody proceeding in state court, you must determine the child's residence and domicile. If either the residence or domicile is on a reservation of a tribe exercising exclusive jurisdiction over the proceeding, the state court dependency proceeding must be dismissed. Cal Rules of Ct 1439(c)(1); see Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.4(a). If the child has previously resided or been domiciled on the reservation, you must contact the tribal court to determine whether the child is a ward of the tribal court. If so, the proceeding must be dismissed. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.4(b). But if the tribe does not intervene or the tribal court does not request transfer, you may exercise jurisdiction under Welf & I C §§300 et seq. Cal Rules of Ct 1439(c)(3).

TIP: You should distinguish between intervention and transferring the case. Intervention is simply the tribe's right to appear as a party in the proceedings. Many tribes intervene, but only participate to the extent of receiving notice of the proceedings. A transfer is a request for the entire case to go to the tribal court for all purposes and terminates state jurisdiction. Some bench officers will not transfer a case to a tribal court without a full home study and reunification plan from the tribe. This gives you a clear picture of the home into which the child is going and fulfills your duty to protect the child.

The ICWA does not define the terms "residence" and "domicile," but the U.S. Supreme Court has ruled that domicile for purposes of the ICWA is to be interpreted as a matter of federal law. *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 47, 109 S Ct 1597, 104 L Ed 2d 29. In *Mississippi Band of Choctaw Indians*, the Court held that if the child's mother is domiciled on the reservation, the child is deemed to be domiciled there as well, even if the child was not born on the reservation, has never lived on the reservation, and was relinquished at birth to non-Indian adoptive parents. See 490 US at 48–49 (involving ten-day-old Indian twins). Any interpretation of state law that conflicts with an assertion of tribal jurisdiction over the tribe's children weakens the tribe's ability to assert an interest in its children and undermines the purposes of the ICWA. The ICWA preempts any inconsistent construction of state law. 490 US at 51–53.

D. [§1.12] Assuming Jurisdiction in Case of Emergency

You may exercise jurisdiction to take emergency custody of an Indian child who is temporarily located off the reservation in order to prevent imminent physical damage or harm to the child even if the tribe has the right to exclusive jurisdiction. Cal Rules of Ct 1439(c)(1)(A); see 25 USC §1922.

The child may be subject to an emergency removal to a foster home or institution in a dependency case, but this removal must be as short as possible, and when the emergency ends or the child's tribe exercises jurisdiction over the case, the placement must end. 25 USC §1922. Cal Rules of Ct 1439(c)(1)(C); see Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.7(c). Absent extraordinary circumstances, temporary emergency custody may not continue for more than 90 days, unless the court determines, on clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Cal Rules of Ct 1439(c)(1)(B); see Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.7(d).

E. [§1.13] Declining Jurisdiction in Case of Improper Removal of Child

If a petitioner in an Indian child custody proceeding before a state court has improperly removed the child from the custody of a parent or Indian custodian, or has improperly retained custody after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and return the child to his or her parent or Indian custodian, unless the court finds that the child would be subject to a substantial and immediate danger or threat of danger. 25 USC §1920.

The BIA Guidelines suggest that if, in the course of any Indian child custody proceeding, the court has reason to believe that the child may have been improperly removed from the

custody of his or her parent or Indian custodian, or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for the removal or retention, the court must immediately stay the proceedings until a determination can be made on the question of improper removal or retention. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.8(a). If the court finds that the petitioner is responsible for the improper removal or retention, the child must be returned immediately to his or her parents or Indian custodian. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.8(b). Because a finding of improper removal goes to the court's jurisdiction to hear the case at all, the court must decide the issue as soon as it arises before proceeding further on the merits. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.8 Commentary.

Chapter 2

NOTICE REQUIREMENTS UNDER THE ICWA

I. [2.1] WHAT IS THE PURPOSE OF NOTICE?

Notice to the child's tribe serves two purposes: (1) it enables the tribe to investigate and determine whether the child is an Indian child; and (2) it advises the tribe of the pending proceeding and its right to intervene or assume tribal jurisdiction. *In re Samuel P.* (2002) 99 CA4th 1259, 1265, 121 CR2d 843. See *In re Nikki R.* (2003) 106 CA4th 844, 848, 131 CR2d 256 (tribe's "significant right" to intervene in state court proceeding is meaningless unless tribe is notified of proceeding). Notice ensures that the tribe will have the opportunity to assert its rights under the ICWA irrespective of the position of the child's parents, the child's Indian custodian, or state agencies. 106 CA4th at 848. A parent cannot waive the tribe's right to notice. 106 CA4th at 849. Without notice to the tribe, the intent of the ICWA and its underlying policy, to protect the best interests of Indian children and to promote stable and secure Indian tribes and families, cannot be achieved.

> TIP: Notice to the tribe can sometimes trigger a disagreement between the tribe and parents and/or grandparents as to the best course of action for the child. The tribe may participate in the proceeding as a party, but the court must make the final decision as to the course of action to be taken.

II. WHEN IS NOTICE REQUIRED?

A. [§2.2] INVOLUNTARY PROCEEDINGS

In any involuntary child custody proceeding in a state court in which the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, the child must notify the child's parents or Indian custodian and the child's tribe of the proceeding and of their right to intervene in the proceeding. 25 USC §1912(a); see Cal Rules of Ct 1439(f).

This notice requirement applies in juvenile court dependency proceedings under Welf & I C §§300 et seq. Cal Rules of Ct 1439(b), (f). See Welf & I C §§290.1(a)(10), 290.2(a)(10), 291(a)(8), 292(a)(7), 293(a)(8), 294(a)(7), 295(a)(9) (requiring notice to Indian custodian and tribe at various stages of dependency proceedings); Cal Rules of Ct 1464(b)(4) (requiring notice to tribe of hearing on petition for adoption of dependent Indian child who has been freed for adoption).

The notice requirement also applies in juvenile court proceedings under Welf & I C §601 and Welf & I C §§602 et seq if the child is at risk of entering foster care or is in foster care. Cal Rules of Ct 1439(b), (f).

> TIP: You should consider working with the probation department to establish a procedure so that inquiry is made in all delinquency cases as to whether the child is an Indian child. This inquiry should occur at the outset of the proceedings (detention or arraignment) rather than waiting until disposition. Then if foster care is recommended or the child is at risk of entering foster care, notice can be made in a timely manner.

B. [§2.3] VOLUNTARY PROCEEDINGS

In a voluntary adoption proceeding in which a parent is seeking to relinquish the child under Fam C §8700 or to execute an adoption placement agreement under Fam C §8801.3, the Department of Social Services must ask the child and the child's parent or custodian whether the child is or may be a member of or eligible for membership in an Indian tribe. Fam C §8620(a)(1). If so, the Department must send a notice, requesting confirmation of the child's Indian status, to the child's parent or custodian and to any tribe of which the child is or may be a member or eligible for membership. Fam C §8620(a)(3)(A). This notice must describe the nature of the proceeding and advise the tribe of its right to intervene in the proceeding. Fam C §8620(a)(3)(B). Notice must be sent whenever there is reason to believe the child may be an Indian child. Fam C §8620(d)(5).

C. [§2.4] TIME FOR GIVING NOTICE

Notice must be given whenever there is reason to believe the child may be an Indian child and for every hearing thereafter unless and until it is determined that the ICWA does not apply. Fam C §8620(d)(5) (adoption proceeding); Cal Rules of Ct 1439(f)(5) (dependency and delinquency proceedings); *In re Jonathan D.* (2001) 92 CA4th 105, 111, 111 CR2d 628 (tribe is entitled to receive notice whenever court becomes aware of child's possible Indian heritage). Even if a child's possible Indian status is discovered late in the proceedings, notice to the tribe is required. *In re Suzanna L.* (2002) 104 CA4th 223, 231, 127 CR2d 860.

> TIP: You risk a reversal, either by the court of appeal or by a set aside motion, if you ignore the mandate to provide notice, even if the proceeding has advanced to permanency planning.

After a tribe has intervened, it becomes a party to the proceeding and is treated the same as any other party. Notice of subsequent proceedings may be given to the tribe (or their attorneys or representatives) as provided by CCP §1010. *In re Krystle D.* (1994) 30 CA4th 1778, 1804, 37 CR2d 132. See Cal Rules of Ct 1439(f)(7) (once tribe intervenes, subsequent notices to tribe may be sent in form provided to all other parties).

D. [§2.5] "MINIMAL SHOWING" TRIGGERS NOTICE REQUIREMENT

Because of the important interests at stake, courts have broadly interpreted the notice requirement of the ICWA and have concluded that it is preferable to err on the side of giving notice. *In re Antoinette S.* (2002) 104 CA4th 1401, 1407, 129 CR2d 15; *Dwayne P. v Superior Court* (2002) 103 CA4th 247, 256–257, 126 CR2d 639.

A "minimal showing" that the child may be an Indian child is all that is required to trigger the notice requirement. *In re Antoinette S., supra,* 104 CA4th at 1407–1408. It is less than the showing needed to establish a child is an Indian child within the meaning of the ICWA. *In re Miguel E.* (2004) 120 CA4th 521, 549, 16 CR3d 530. See §1.3. This "minimal showing" is satisfied by evidence "suggesting" that the child may be an Indian child. *In re Antoinette S., supra,* 104 CA4th at 1407; *Dwayne P. v Superior Court, supra,* 103 CA4th at 258. The Indian status of the child need not be certain to invoke the notice requirement. *In re Miguel E., supra,* 120 CA4th at 549; *In re Gerardo A.* (2004) 119 CA4th 988, 994, 14 CR3d 798. "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only

a suggestion of Indian ancestry to trigger the notice requirement." *In re Nikki R.* (2003) 106 CA4th 844, 848, 131 CR2d 256.

E. [§2.6] CONSEQUENCES OF FAILING TO GIVE NOTICE

To enforce the notice requirement, the ICWA provides that any Indian child who is the subject of any action for foster care placement or termination of parental rights, any parent or Indian custodian from whose custody the child was removed, or the child's tribe may petition any court of competent jurisdiction to invalidate the action on a showing that the notice requirement was violated. See 25 USC §1914; discussion in §5.14. When proper notice is not given, the court's order is voidable. *Dwayne P. v Superior Court* (2002) 103 CA4th 247, 254, 126 CR2d 639.

A failure to comply with the notice requirement usually constitutes prejudicial error requiring reversal and remand, unless the tribe participated in or indicated no interest in the proceeding. *In re Antoinette S.* (2002) 104 CA4th 1401, 1411, 129 CR2d 15; *In re Samuel P.* (2002) 99 CA4th 1259, 1265, 1267, 121 CR2d 843. A failure to comply with the notice requirement is not "a mere technicality" (*In re Elizabeth W.* (2004) 120 CA4th 900, 908, 16 CR3d 514), and a court that fails to ensure compliance with the notice requirement faces a "strong likelihood" of reversal on appeal (*In re H. A.* (2002) 103 CA4th 1206, 1214, 128 CR2d 12). The issue of compliance may be raised for the first time on appeal. *In re Suzanna L.* (2002) 104 CA4th 223, 231–232, 127 CR2d 860. Although a parent may not waive a tribe's right to receive notice, the parent may waive his or her personal right to object to a failure to comply with the ICWA notice requirements. *In re S.B.* (2005) 130 CA4th 1148, 1160, 30 CR3d 726 (tribe was notified and did not object to prior actions, parent's failure to object at the time waived right to object on appeal)

III. WHO MUST INQUIRE INTO CHILD'S INDIAN STATUS?

A. [§2.7] GENERAL DUTY OF INQUIRY

The court, social services, and probation have an affirmative duty to inquire about a child's Indian status. *In re Glorianna K.* (2005) 125 CA4th 1443, 1449, 24 CR3d 582; *In re Nikki R.* (2003) 106 CA4th 844, 848, 131 CR2d 256. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §§B.1(a), B.5(a); Cal Rules of Ct 1439(d). The Commentary to §B.5 of the BIA Guidelines recommends that courts routinely inquire of participants in child custody proceedings whether the child is an Indian child. If any participant asserts that the child is an Indian or that there is reason to believe the child may be an Indian, the court must contact the tribe or the BIA for verification.

> TIP: The query as to a child's Indian status follows parentage, so in some cases if alleged fathers are added as parents, the same query as to Indian ancestry must be made.

Generally, the first notice the court will receive that a child in a custody proceeding before the court may be an Indian child will be from the petition initiating the proceeding. The Judicial Council forms of Juvenile Dependency Petition (Version One) (JV-100), Juvenile Dependency Petition (Version Two) (JV-110), and Juvenile Wardship Petition (JV-600) contain boxes that must be checked if the county welfare department (in a dependency proceeding) or the county

probation department (in a delinquency proceeding) knows or has reason to know that the child may be an Indian child. Cal Rules of Ct 1439(e). A petitioner who seeks to adopt an Indian child must complete the Judicial Council form, Adoption of Indian Child (Adopt-220), and attach it to the Adoption Request (Adopt-200). See Cal Rules of Ct 1464(a)(3).

When the petition indicates that the child does not have Indian heritage, the court has no obligation to make a further or additional inquiry absent any information or suggestion that the child might have Indian heritage. *In re Aaliyah G.* (2003) 109 CA4th 939, 942, 135 CR2d 680.

> TIP: Because the mandatory petitions do not have an affirmative declaration indicating that a person is not Indian, form JV-130 has been added to the forms to be completed. The form asks for Indian heritage information and includes a box to indicate that the parent does not have any Indian ancestry as far as he or she knows. By rule, the form is required to be completed at the parent or guardian's first appearance. Cal Rules of Ct 1439(d)(3); see discussion at §2.9.

B. [§2.8] PROBABLE CAUSE TO BELIEVE CHILD IS INDIAN CHILD

Circumstances that may provide probable cause for the court to believe a child is an Indian child include, but are not limited to, the following:

- A person having an interest in the child (including the child, an Indian tribe, an Indian organization, an officer of the court, or a public or private agency) informs the court, the county welfare agency, or the probation department, or provides information suggesting, that the child is an Indian child. Cal Rules of Ct 1439(d)(4)(A). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.1(c). For example, notice was required when:
  - A party offered the name of a tribe to which the child might belong. *In re Marinna J.* (2001) 90 CA4th 731, 737, 109 CR2d 267.
  - A father claimed that his grandparents had Native American ancestry. *In re Antoinette S.* (2002) 104 CA4th 1401, 1406, 129 CR2d 15; *In re Suzanna L.* (2002) 104 CA4th 223, 231, 127 CR2d 860. But see *In re O.K.* (2003) 106 CA4th 152, 157, 130 CR2d 276 (paternal grandmother's assertion that father "may have Indian in him" was not based on any known Indian ancestors and was too vague and speculative to give court any reason to believe children might be Indian children).
  - A child's family provided information about family members who were born on the reservation, received BIA services, and attended an Indian school. See *In re Samuel P.* (2002) 99 CA4th 1259, 1266–1267, 121 CR2d 843.
- The residence of the child, the child's parents, or an Indian custodian is in a predominantly Indian community. Cal Rules of Ct 1439(d)(4)(B). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.1(c)(iv).
- The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. Cal Rules of Ct 1439(d)(4)(C).

C. Obtaining Information From Child, Parent, or Guardian

1. [§2.9] Dependency or Delinquency Proceeding

In a dependency proceeding under Welf & I C §§300 et seq, the social worker must ask the child (if the child is old enough) and the parents or legal guardians whether the child may be an Indian child or may have Indian ancestors. Cal Rules of Ct 1439(d)(2). The same inquiry must be made by the probation officer in a juvenile delinquency proceeding under Welf & I C §601 or §602 if the officer believes that the child is at risk of entering foster care or is in foster care. Cal Rules of Ct 1439(d)(1).

At the first appearance by a parent or guardian in a dependency case or in a juvenile delinquency proceeding in which the child is at risk of entering foster care or is in foster care, the court must order the parent or guardian to complete Judicial Council form JV-130, Parental Notification of Indian Status. Cal Rules of Ct 1439(d)(3). This form requires the parent or guardian to indicate whether he or she may be a member of or eligible for membership in a federally recognized Indian tribe, whether he or she may have Indian ancestry, and whether the child is or may be a member of or eligible for membership in a federally recognized Indian tribe.

> TIP: Most courts are treating JV-130 forms the same as change of address forms to ensure that every parent completes a form at his or her first appearance. In delinquency proceedings, many judges are having this form completed at the initial detention hearing to avoid delaying the disposition hearing at which out-of-home placement may be ordered.

2. [§2.10] Adoption Proceeding

If a parent is seeking to relinquish a child under Fam C §8700 or to execute an adoption placement agreement under Fam C §8801.3, the Department of Social Services, licensed adoption agency, or adoption service provider must ask the child and the child's parent or custodian whether the child is or may be a member of or eligible for membership in an Indian tribe, or whether the child has been identified as a member of an Indian organization. Fam C §8620(a)(1). If there is any oral or written information indicating the child is or may be an Indian child, the Department, agency, or provider must obtain the following information (Fam C §8620(a)(2)):

- The child's name, birth date, and place of birth.
- The name, address, birth date, and tribal affiliation of the birth parents, maternal and paternal grandparents, and maternal and paternal great-grandparents of the child.
- The name and address of the child's extended family members who have a tribal affiliation.
- The name and address of the Indian tribes or Indian organizations of which the child is or may be a member.
- A statement of the reasons why the child is or may be an Indian.

Judicial Council form Adopt-220, Adoption of Indian Child, must be completed and attached to the Adoption Request (Adopt-200) if the proceeding involves an Indian child, specifying the child's tribe or the tribe in which the child is eligible for membership, the child's enrollment number (if known), the names and addresses of the child's biological parents, the

names of the child's biological Indian grandparents, and the names of other persons having information about the child's Indian ancestry. See Cal Rules of Ct 1464(a)(3).

D. [§2.11] TRIBE'S DETERMINATION OF CHILD'S INDIAN STATUS

One of the primary purposes of giving notice of the proceeding to the tribe is to enable the tribe to determine whether the child involved in the proceeding is an Indian child. *In re Jeffrey A.* (2002) 103 CA4th 1103, 1107, 127 CR2d 314. A tribe's determination that a child is or is not a member of or eligible for membership in the tribe is conclusive. Cal Rules of Ct 1439(g)(1). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.1(b)(i). The tribe must be a federally recognized tribe, group, or community, as defined by the BIA as eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians. Cal Rules of Ct 1439(g)(3). See §1.3.

The determination is made by affirmative information received from the tribe as to the child's status or by its nonresponse in the 60 days. Cal Rules of Ct 1439(f)(6), (g).

Information that the child is not enrolled in the tribe is not determinative of the child's Indian status. Cal Rules of Ct 1439(g)(2). The fact that the child's parents are not enrolled members of any tribe is also not dispositive because parental enrollment is not the sole means of establishing tribal membership for a child. *In re Antoinette S.* (2002) 104 CA4th 1401, 1406–1407, 129 CR2d 15. See *In re Suzanna L.* (2002) 104 CA4th 223, 232, 127 CR2d 860 (noting that many tribes do not have written rolls). A determination by the tribe that a child's half siblings are not members of the tribe is also not determinative of the child's status because a determination of tribal membership must be made on an individual basis, and blood quantum is not determinative. *In re Desiree F.* (2000) 83 CA4th 460, 470, 99 CR2d 688.

> TIP: California has over 100 federally recognized tribes, and each has the authority to proffer its own rules and requirements for determining membership. These rules can be subject to change at any time. Thus, this determination must be made by each tribe for each child in each case.

A determination by the BIA that a child is or is not an Indian is conclusive, absent a contrary determination by the tribe. Cal Rules of Ct 1439(g)(4). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.1(b)(ii).

IV. WHO IS ENTITLED TO NOTICE?

A. [§2.12] CHILD'S PARENTS

Notice of the proceeding must be given to the child's parents when their identity and location are known. 25 USC §1912(a); 25 CFR §23.11(a); Fam C §8620(a)(3)(A) (adoption proceeding); Cal Rules of Ct 1439(f) (dependency and delinquency proceedings). Under the ICWA, "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoption under tribal law or custom. 25 USC §1903(9); Cal Rules of Ct 1439(a)(4). Even a non-Indian parent has rights under the ICWA, including the right to notice. *In re Jonathon S.* (2005) 129 CA4th 334, 339, 28 CR3d 495.

However, an unwed father whose paternity has not been acknowledged or established is not a "parent" for purposes of the ICWA. 25 USC §1903(9); Cal Rules of Ct 1439(a)(4); *In re*

Daniel M. (2003) 110 CA4th 703, 707–709, 1 CR3d 897 ("alleged" father cannot complain of lack of notice). Because the ICWA does not provide a standard for acknowledging or establishing paternity, courts have resolved this issue by applying state law. They have held that an unwed father must take some official action, such as filing a voluntary declaration of paternity, establishing paternity legal proceedings, or petitioning to have his name placed on the child's birth certificate. 110 CA4th at 708. In California, an alleged father may acknowledge or establish paternity by voluntarily signing a declaration of paternity at the time of the child's birth to file with the birth certificate (Fam C §7571(a)), or through blood testing (Fam C §7551). 110 CA4th at 708–709.

The ICWA does not require that the parents receive a copy of the notice sent to the tribe. *In re L.B.* (2003) 110 CA4th 1420, 1426–1427, 3 CR3d 16.

B. [§2.13] Child's Indian Custodian

Notice of the proceeding must be given to the child's Indian custodian when the custodian's identity and location are known. 25 USC §1912(a); 25 CFR §23.11(a); Fam C §8620(a)(3)(A) (adoption proceeding); Cal Rules of Ct 1439(f) (dependency and delinquency proceedings). Under the ICWA, "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent. 25 USC §1903(6); Cal Rules of Ct 1439(a)(3).

C. Child's Tribe

1. [§2.14] General Requirement of Notice

Notice of the proceeding must also be given to the child's tribe when the identity and location of the tribe are known. 25 USC §1912(a); 25 CFR §23.11(a); Fam C §8620(a)(3)(A) (adoption proceeding); Cal Rules of Ct 1439(f) (dependency and delinquency proceedings). Because the question of a child's tribal membership rests with each Indian tribe (see §2.11), when the court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question. *In re Jeffrey A.* (2002) 103 CA4th 1103, 1107, 127 CR2d 314.

Under the ICWA, "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or eligible for membership or (2), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the child has more significant contacts. 25 USC §1903(5); Cal Rules of Ct 1439(a)(2). Notice must be sent to all tribes of which the child may be a member or eligible for membership. Fam C §8620(d)(3) (adoption proceeding); Cal Rules of Ct 1439(f)(3) (dependency and delinquency proceedings). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.2(b); *In re Desiree F.* (2000) 83 CA4th 460, 475–476, 99 CR2d 688 (notice to one tribe does not protect rights of another interested tribe). See also *In re Louis S.* (2004) 117 CA4th 622, 632–633, 12 CR3d 110 (if all members of tribe have merged with another tribe, notice solely to this other tribe is sufficient).

When there is evidence that the child has a certain Indian heritage, but the identity of the specific tribe of which the child may be a member is unknown, the notice requirement is satisfied if notice is sent to at least some of the federally recognized tribes, as well as to the BIA. *In re C.D.* (2003) 110 CA4th 214, 226–227, 1 CR3d 578 (notice to two of three federally recognized Cherokee tribes and to BIA was sufficient when child's mother indicated she was of Cherokee

heritage but did not identify specific Cherokee tribe); *In re Edward H.* (2002) 100 CA4th 1, 4, 122 CR2d 242 (notice to two of three federally recognized Choctaw tribes and to BIA was sufficient when identity of actual Choctaw tribe in which children might be eligible for membership was unknown). Once notice is sent to the BIA, the burden of identifying and providing notice to the proper tribe shifts from the court to the BIA. *In re C.D., supra*, 110 CA4th at 227. See §2.17.

If a child may be a member of or eligible for membership in more than one tribe, notice must be sent to all the tribes and the BIA before proceeding. Cal Rules of Ct 1439(f)(3).

2. [§2.15] Giving Notice to Tribal Chairperson or Designated Agent for Service

Unless the tribe has designated another agent for service, notice to the tribe must be given to the tribal chairperson. Fam C §8620(d)(2) (adoption proceeding); Cal Rules of Ct 1439(f)(2) (dependency and delinquency proceedings). The notice should be addressed to this individual and not merely to the tribe (see *In re Louis S.* (2004) 117 CA4th 622, 633, 12 CR3d 110), the tribe's business committee (see *In re Asia L.* (2003) 107 CA4th 498, 509, 132 CR2d 733), or other tribal entity (see *In re H. A.* (2002) 103 CA4th 1206, 1213, 128 CR2d 12 (notice addressed to tribe's health clinic was insufficient when clinic was not tribe's designated agent)).

The Secretary of the Interior updates and publishes a list of the names and addresses of designated agents for service of the notice in the Federal Register. A current list is also available through area offices of the BIA. 25 CFR §23.12. The BIA list, however, is often out of date and should be supplemented with the information in a list maintained by the State Department of Child Services on their Web site at: www.childsworld.ca.gov/res/pdf/alphatribe.doc.

> TIP: Although the Federal Register list is specifically mentioned in the Guidelines, if there are differences between the two sources, you should probably send the notice to agents listed in both.

D. [§2.16] SECRETARY OF THE INTERIOR

If the identity or location of the child's parents or Indian custodian and the child's Indian tribe cannot be determined, notice of the proceeding must be given to the Secretary of the Interior. 25 USC §§1903(11), 1912(a); 25 CFR §23.11(b); Fam C §8620(d)(4) (adoption proceeding); Cal Rules of Ct 1439(f)(4) (dependency and delinquency proceedings); *In re Merrick V.* (2004) 122 CA4th 235, 246, 19 CR3d 490. Notice to the Secretary is accomplished by giving notice to the Area Director of the BIA. *In re Antoinette S.* (2002) 104 CA4th 1401, 1406, 129 CR2d 15. See *Alicia B. v Superior Court* (2004) 116 CA4th 856, 865, 11 CR3d 11 (BIA acts as Secretary's agent).

The ICWA does not provide for intervention by the BIA in the custody proceedings. Instead, the purpose of giving notice to the BIA is to allow it to use its resources to find the necessary information to give the requisite notice to the appropriate tribe or tribes. *In re Antoinette S., supra*, 104 CA4th at 1406, 1414 n4. Giving notice to the BIA shifts the burden of identifying and providing notice to the proper tribe to the BIA. *In re Desiree F.* (2000) 83 CA4th 460, 469, 99 CR2d 688. To establish tribal identity, the notice to the BIA must provide as much information as is known about the child's direct lineal ancestors. 25 CFR §23.11(b).

On receipt of the notice, the Secretary must make reasonable documented efforts to locate and notify the child's tribe and the child's parents or Indian custodian. 25 CFR §23.11(f). The Secretary has 15 days after receipt of the notice within which to provide notice to the parents or

Indian custodian and the child's tribe. 25 USC §1912(a); 25 CFR §23.11(f); Fam C §8620(d)(4) (adoption proceeding); Cal Rules of Ct 1439(f)(4) (dependency and delinquency proceedings). See Welf & I C §§290.1(c), 290.2(c)(3), 291(c)(3), 292(c), 293(c), 294(c)(3), 295(c) (specifying this notice requirement at various stages of dependency proceedings).

The Secretary must send a copy of the notice to the court within this 15-day period. 25 CFR §23.11(f). If the Secretary is unable to verify that the child meets the criteria of an Indian child under 25 USC §1903 or is unable to locate the child's parents or Indian custodian within the 15-day period, the Secretary must so inform the court and state how much more time, if any, will be needed to complete the search. 25 CFR §23.11(f).

When notice is given to the child's parents or Indian custodian and the child's tribe, copies of this notice must be sent to the Area Director of the BIA. 25 CFR §23.11(a).

In California, these notices must be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825. 25 CFR §23.11(c)(12).

V. WHAT FORM OF NOTICE IS REQUIRED?

A. [§2.17] WRITTEN NOTICE

There must be actual notice to the tribe of both the pending proceeding and its right to intervene in that proceeding. *In re Samuel P.* (2002) 99 CA4th 1259, 1265, 121 CR2d 843. A tribe's mere "awareness" of a custody proceeding involving a possible Indian child is not considered sufficient notice under the ICWA. 99 CA4th at 1266. Speaking with various tribal members in an attempt to determine the child's Indian status also does not satisfy the notice requirement. *In re Suzanna L.* (2002) 104 CA4th 223, 232, 127 CR2d 860.

B. [§2.18] INFORMATION THAT MUST BE INCLUDED IN NOTICE

The notice must contain sufficient information to enable the tribe or the BIA to determine whether the child is an Indian child. *In re D.T.* (2003) 113 CA4th 1449, 1455, 5 CR3d 893. See *In re Karla C.* (2003) 113 CA4th 166, 175, 6 CR3d 205 (notice must contain enough information to constitute meaningful notice). In the notice, the petitioning agency must include all of the Indian heritage information it has collected pertaining to the child. *In re Gerardo A.* (2004) 119 CA4th 988, 995–996, 14 CR3d 798.

The ICWA requires that the following information be included in the notice, if known:

- The child's name, birth date, and birthplace. 25 CFR §23.11(a), (d)(1).
- The name of each Indian tribe in which the child is enrolled or may be eligible for enrollment. 25 CFR §23.11(a), (d)(2).
- All names known for, and current and former addresses of, the child's biological mother, biological father, maternal and paternal grandparents and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as birth dates, places of birth and death, tribal enrollment numbers, and other identifying information. 25 CFR §23.11(a), (d)(3). See *In re S.M.* (2004) 118 CA4th 1108, 1116–1117, 13 CR3d 606 (notice that failed to contain any information about child's great-grandmother who allegedly had Indian heritage or about child's grandmother with whom she was living, and that omitted other identifying information about child's mother, grandparents, and great-grandparents, was insufficient); *In re Louis S.* (2004) 117 CA4th

622, 631, 12 CR3d 110 (notice that contained misspelled and incomplete names and that omitted birth dates was insufficient).

- A copy of the petition, complaint, or other document by which the proceeding was initiated. 25 CFR §23.11(a), (d)(4).
- A statement of the absolute right of the biological Indian parents, the child's Indian custodian, and the child's tribe to intervene in the proceedings. 25 CFR §23.11(a), (e)(1).
- A statement that if the Indian parents or Indian custodian cannot afford counsel and the court determines they are indigent, counsel will be appointed to represent them. 25 CFR §23.11(a), (e)(2).
- A statement of the right of the Indian parents, the Indian custodian, and the child's tribe to be granted up to 20 additional days to prepare for the proceedings, on request. 25 CFR §23.11(a), (e)(3).
- The location, mailing address, and telephone number of the court and all parties given notice of the proceedings. 25 CFR §23.11(a), (e)(4).
- A statement of the right of the Indian parents, Indian custodian, and the child's tribe to petition the court to transfer the proceeding to the child's tribal court, absent objection by either parent. 25 CFR §23.11(a), (e)(5).
- A statement of the potential legal consequences of the proceedings on the future parental or custodial rights of the Indian parents or Indian custodian. 25 CFR §23.11(a), (e)(6).
- A statement that, because child custody proceedings are conducted on a confidential basis, all parties given notice must keep the information contained in the notice confidential. 25 CFR §23.11(e)(7).

C. [§2.19] Judicial Council Forms of Notice

The Judicial Council has developed forms to satisfy the ICWA notice requirements. For a voluntary adoption proceeding, the Notice of Voluntary Adoption Proceedings for an Indian Child (ADOPT-226) must be sent to those entitled to notice. See Fam C §8620(a)(2), (3), (d). For a dependency proceeding under Welf & I C §§300 et seq or a delinquency proceeding under Welf & I C §§601 et seq in which the child is at risk of entering foster care or is in foster care, the Notice of Involuntary Child Custody Proceedings for an Indian Child (Juvenile Court) (JV-135) must be sent to those entitled to notice. (Cal Rules of Ct 1439(f)(1)).

These forms replace California Department of Social Services forms SOC 318 and SOC 319, which had been used to provide notice under the ICWA, and request confirmation of a child's possible Indian status. These forms were found to be deficient. See *In re C.D.* (2003) 110 CA4th 214, 225–226, 1 CR3d 578.

D. [§2.20] Determining Sufficiency of Notice

Although the petitioning agency has the duty to give notice, you, rather than the agency, must determine whether the notice is sufficient under the ICWA. *In re Nikki R.* (2003) 106 CA4th 844, 852, 131 CR2d 256. See *In re H. A.* (2002) 103 CA4th 1206, 1211, 128 CR2d 12 (court has sua sponte duty to ensure compliance with notice requirements). You must ask for and receive evidence of the agency's efforts to give notice to determine if these efforts meet the standards set forth in the ICWA. *In re Nikki R., supra,* 106 CA4th at 852. You must also review

the notice that was sent to confirm that it complies with all requirements. *In re Jennifer A.* (2002) 103 CA4th 692, 705–706, 127 CR2d 54. See §2.23.

> TIP: In the ICWA area, you must be familiar with the notice requirements and follow up with staff and Department of Social Services or Probation to ensure it was done correctly. More dependency cases have been reversed in this area for failing to send a correctly completed notice to the proper party than for any other issue. You should not proceed to disposition without the ICWA notice being resolved or complete.

A request to a tribe for confirmation of a child's possible Indian status is not sufficient notice under the ICWA when the request provides no information about the pending proceedings, no court number identifies the proceedings, and no notice informs the tribe of the dates of any hearings. *In re Samuel P.* (2002) 99 CA4th 1259, 1266, 121 CR2d 843.

VI. HOW IS NOTICE SERVED AND PROVED?

A. [§2.21] SERVICE REQUIREMENTS

The notice must be given by registered or certified mail, with return receipt requested. 25 USC §1912(a); 25 CFR §23.11(a); Fam C §8620(d)(1) (adoption proceeding); Cal Rules of Ct 1439(f)(1) (dependency and delinquency proceedings). See Welf & I C §§290.1(e), 290.2(e), 291(e)(4), 292(e)(2), 293(e)(2), 294(h), 295(e) (specifying that notices at various stages of dependency proceedings involving Indian child must be given by registered mail, return receipt requested).

Additional notice by first-class mail is recommended. Fam C §8620(d)(1) (adoption proceeding); Cal Rules of Ct 1439(f)(1) (dependency and delinquency proceedings).

Notice may also be given by personal service. 25 CFR §23.11(d).

B. [§2.22] PROOF OF NOTICE

Proof of notice, including copies of notices sent and all return receipts and responses received, must be filed with the court. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.5(d); Cal Rules of Ct 1439(f); *In re Elizabeth W.* (2004) 120 CA4th 900, 906, 16 CR3d 514 (although ICWA does not require filing of receipts and correspondence from tribes with the court, this requirement has been adopted in California to "head off" numerous appellate complaints of noncompliance with ICWA); *In re S.M.* (2004) 118 CA4th 1108, 1118, 13 CR3d 606 (agency must file with court all responses it receives from any tribes, including requests for additional information); *In re Karla C.* (2003) 113 CA4th 166, 178, 6 CR3d 205 (filing requirement set forth in BIA Guidelines is essential component of ICWA notice process). The court may not rely on mere representations that proper notice was given. There must be a court record of the notice documents. *In re Glorianna K.* (2005) 125 CA4th 1443, 1449, 24 CR3d 582.

Filing a copy of the notice is required so that the court may review the notice to determine whether it complies with the ICWA and gives the tribe all known relevant information and a meaningful opportunity to determine whether the child is an Indian child. *Alicia B. v Superior Court* (2004) 116 CA4th 856, 865, 11 CR3d 11; *In re Karla C., supra,* 113 CA4th at 178. Filing the notice also enables the court to correct any errors or omissions in the notice in a timely fashion. *In re Louis S.* (2004) 117 CA4th 622, 631, 12 CR3d 110. Merely filing a tribe's

response to the notice without also filing a copy of the notice is insufficient because the court cannot determine from the response alone whether the notice provided the tribe with all known relevant information. 117 CA4th at 629. A failure to file the notice is prejudicial error even if the tribe has responded that it could not trace the child and does not consider the child to be an Indian child, because the information from which the tribe made this determination is not known. *In re Jennifer A.* (2002) 103 CA4th 692, 705, 127 CR2d 54.

If the record shows unequivocally that proper notice was given to the proper tribes and that responses were received, and the only omission is a failure to file a proof of service, compliance with the notice requirement may be deemed sufficient. *In re Elizabeth W., supra,* 120 CA4th at 907. But compliance is not sufficient if the only evidence that notice was sent is:

- A conclusory statement in the social worker's report that notice was sent (120 CA4th at 907; *In re Samuel P.* (2002) 99 CA4th 1259, 1266, 121 CR2d 843); or
- A social worker's testimony that he or she served the proper tribes with notice (*In re Asia L.* (2003) 107 CA4th 498, 508–509, 132 CR3d 733).

VII. [§2.23] WHAT IF THERE IS NO RESPONSE TO NOTICE?

If, after a reasonable time following the sending of the notice—but in no event less than 60 days—no determinative response to the notice is received, the court may determine that the ICWA does not apply to the case, unless further evidence of the applicability of the ICWA is subsequently received. Cal Rules of Ct 1439(f)(6). The ICWA does not require a court to continue a case indefinitely while awaiting a response from the tribe. *In re Suzanna L.* (2002) 104 CA4th 223, 231, 127 CR2d 860.

When no response is received from a tribe after proper inquiry and notice, this is tantamount to a determination that the child is not an Indian child within the meaning of the ICWA, and neither the court nor the social services agency has any further obligations under the ICWA. *In re Jasmine G.* (2005) 127 CA4th 1109, 1118, 26 CR3d 394; *In re L.B.* (2003) 110 CA4th 1420, 1427, 3 CR3d 16.

> TIP: A nonresponse, however, does not necessarily put an end to the inquiry. Under the ICWA, a tribe may intervene in a proceeding up to the final stages of adoption. See *In re Desiree F.* (2000) 83 CA4th 460, 472–473, 99 CR2d 688. And the introduction of new evidence of Indian ancestry may require notice later in the proceedings. A balance must be struck between the statutory demands of dependency and delinquency proceedings and notice requirements.

Chapter 3

PROCEEDINGS AFTER NOTICE IN JUVENILE COURT DEPENDENCY OR DELINQUENCY PROCEEDING

I. [§3.1] WHEN MAY A HEARING BE SCHEDULED AFTER NOTICE?

A juvenile court hearing in a dependency proceeding under Welf & I C §§300 et seq, or in a delinquency proceeding under Welf & I C §§601, 602 et seq, in which the child is at risk of entering foster care or is in foster care, must not be held until at least ten days after receipt of notice of the proceeding by the parent or Indian custodian and the tribe or the Secretary of the

Interior. 25 USC §1912(a); Welf & I C §291(c)(3); Cal Rules of Ct 1439(h); *In re Jennifer A.* (2002) 103 CA4th 692, 704, 127 CR2d 54 (giving less than ten days' notice does not comply with ICWA "technically or substantially"); *In re Jonathan D.* (2001) 92 CA4th 105, 110, 111 CR2d 628 (all tribes must receive notice at least ten days before hearing). All proceedings should be suspended until a minimum of ten days after receipt of notice. *In re Jennifer A., supra,* 103 CA4th at 709.

On request, you must grant the parent, Indian custodian, or tribe a continuance of up to 20 days to prepare for the hearing. 25 USC §1912(a); Cal Rules of Ct 1439(h). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §B.6.

> TIP: Notice of the initial hearing must be provided to a tribe as soon as possible and a rehearing may be required if a tribe requests it because the 10-day period was not satisfied. Some courts have an arrangement with DSS to contact a tribe's ICWA representative shortly after removal, which allows the tribe to appear at the hearing and waive the 10-day requirement. Some bench officers make telephone contact with tribal ICWA representatives on the day of the initial hearing and allow them to make a telephonic appearance. See discussion at §1.12.

II. WHO HAS A RIGHT OF INTERVENTION?

A. [§3.2] IN GENERAL

A child's Indian custodian and Indian tribe have the right to intervene at any point in a dependency or delinquency proceeding. 25 USC §1911(c); Cal Rules of Ct 1412(i), 1439(h). The tribe is given this right under the ICWA because it has an interest in the child that is distinct from, but on a parity with, the interest of the parents. See *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 52, 109 S Ct 1597, 104 L Ed 2d 29. The tribe may intervene after parental rights have been terminated and while the child is awaiting adoption. *In re Desiree F.* (2000) 83 CA4th 460, 472–473, 99 CR2d 688.

The tribe may appear by counsel or by a representative that the tribe has designated to intervene on its behalf. The representative's name and a statement of his or her authorization to appear for the tribe must be submitted to the court in the form of a tribal resolution or other document evidencing an official act of the tribe. Cal Rules of Ct 1412(i)(1).

> TIP: Tribes have different ways of asserting their right to intervene. You may not require that a tribe assert its right on a pleading. A simple assertion orally, on the record, or in writing is sufficient.

If the tribe does not intervene as a party, the court may permit an individual affiliated with the tribe, or a representative of a program operated by another tribe or Indian organization on the tribe's request, to be present at the hearing, to address the court, to receive notice of hearings, to examine all court documents related to the case, to submit written reports and recommendations to the court, and to perform other duties and responsibilities as requested or approved by the court. Cal Rules of Ct 1412(i)(2). If a tribe chooses not to intervene or even play any role in a proceeding, the ICWA still applies to the proceeding if the child is an Indian child.

B. [3.3] INTERVENING PARTY RIGHTS

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to examine documents. See CCP §387; Cal Rules of Ct 1439(h)(2). A tribe may be represented by counsel at its own expense; however, the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved.

> TIP: In many cases, instead of being represented by an attorney, tribes send a tribal agent or employee, such as the tribe's ICWA representative to court. Bench officers who have worked with tribal representatives recommend that you state that the tribal representative need not be an attorney to participate fully in the hearing, which also covers out-of-state tribal attorneys not licensed in California. Others suggest taking extra time to review the hearing process with the representative.

III. WHO MAY HAVE COUNSEL APPOINTED?

A. [§3.4] PARENT OR CUSTODIAN

An indigent parent or indigent Indian custodian has a right to court-appointed counsel in any involuntary removal, placement, or termination proceeding. 25 USC §1912(b). See Fam C §§7860, 7862 (appointment of counsel for indigent parent in proceeding for freedom from parental custody and control); Welf & I C §§317(a) (appointment of counsel for indigent parent in dependency proceeding), 634 (appointment of counsel for indigent parent in delinquency proceeding); Cal Rules of Ct 1439(h)(1) (appointment of counsel for indigent parent in dependency and delinquency proceedings).

> CAUTION: Although Welf & I C §634 does not require you to appoint separate counsel for an indigent parent in a delinquency case unless there a conflict of interest between the parent and child (see *In re Jesse V.* (1989) 214 CA3d 1619, 1624; 263 CR 369), the indigent parent and indigent Indian custodian have a right to court-appointed counsel in delinquency cases to which the ICWA applies. Cal Rules of Ct 1439(h)(1). It is best to make such an appointment (and provide notice) when you know that foster care placement is a potential recommendation of probation.

B. [§3.5] CHILD

The court has discretion to appoint counsel for the child if the court finds that the appointment is in the child's best interest. 25 USC §1912(b). See Fam C §7861 (appointment of counsel for child in proceeding for freedom from parental custody and control); Welf & I C §§317(c) (appointment of counsel for child in dependency proceeding), 634 (appointment of counsel for child in delinquency proceeding).

IV. [§3.6] WHO MAY EXAMINE DOCUMENTS?

All parties to a dependency or delinquency proceeding involving an Indian child, including the child's parents, the child, the child's Indian custodian, and the child's tribe have the right to

examine all reports or other documents filed with the court in the proceeding. 25 USC §1912(c); Cal Rules of Ct 1439(h)(2). The court may not make any decision based on any report or other document that is not filed with the court. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.1.

V. WHAT IS THE ACTIVE REMEDIAL EFFORTS REQUIREMENT?

A. [§3.7] IN GENERAL

Any party seeking an involuntary foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 USC §1912(d); Cal Rules of Ct 1439(i)(4), (l), (m)(4). This requirement applies regardless of whether the child's tribe has intervened in the proceeding. *In re Jonathon S.* (2005) 129 CA4th 334, 339, 28 CR3d 495. The standard of proof on this issue is clear and convincing evidence, not proof beyond a reasonable doubt even for the termination of parental rights. *In re Michael G.* (1998) 63 CA4th 700, 710–712, 74 CR2d 642. The standard is higher than the finding of "reasonable efforts" needed for a non-Indian child.

B. [§3.8] WHAT EFFORTS MUST BE MADE?

The BIA guidelines specify that the active remedial efforts must take into account the prevailing social and cultural conditions and way of life of the child's tribe and must also involve and use the available resources of the child's extended family, the tribe, Indian social service agencies, and individual Indian caregivers. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.2. The active remedial and rehabilitative efforts must be directed at remedying the basis for the parental removal proceedings; therefore, the type of services required depends on the facts of each case. *In re Michael G.* (1998) 63 CA4th 700, 713, 74 CR2d 642. Active efforts to provide services must include attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers. Cal Rules of Ct 1439(i)(4), (l)(2)

There is no bright-line test for determining active efforts. The California appellate courts have compared the active-efforts requirement with the dependency determination of reasonable efforts under Welf & Inst C §361(d)**.** "It has been said that 'the standards in assessing whether "active efforts" were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable.'" *In re S.B.* (2005) 130 CA4th 1148, 1165, 30 CR3d 726, quoting *In re Michael G., supra*, 63 CA4th at 714; see also *Letitia V. v Superior Court* (2000) 81 CA4th 1009, 1016, 97 CR2d 303. But the efforts must be clearly documented, and failure to provide full services to which a family may be entitled can result in a reversal. *In re Michael G., supra,* 63 CA4th at 715 (parents received 10 months of services rather than the 12 months to which they were entitled; case reversed even though there was little hope of reunification).

Active efforts include attempts to preserve the parent-child relationship regardless of the strength of the parent-child relationship or interaction. *In re Crystal K.* (1990) 226 CA3d 655, 667 (parents never had physical custody). Active efforts, however, need not relate directly to parental rehabilitation. Attempts to find the parent to provide rehabilitation services may be sufficient. *In re William G.* (2001) 89 CA4th 423, 428. But active efforts must be aimed at

remedying the basis for removal of the child or termination of parental rights. *Crystal K., supra,* 226 CA3d at 667.

> TIP: Active efforts should begin before the social worker or probation officer (in delinquency cases where the child is at risk of entering foster care) has filed a petition or removed the child. When you make the finding that active efforts were made and were unsuccessful, you are concluding that efforts were made to prevent the breakup of the Indian family and that attempts were made to preserve the parent-child relationship.

The active-efforts requirement does not mean that reunification services must be provided for a child when it would be futile to do so. For example, a court may properly deny reunification services to a parent or guardian based on one or more of the grounds set forth in Welf & I C §361.5(b), without violating 25 USC §1912(d). *Letitia V. v Superior Court* (2000) 81 CA4th 1009, 1015–1016, 97 CR2d 303 (court need not undertake idle acts to prevent breakup of family). See *In re William G.* (2001) 89 CA4th 423, 428, 107 CR2d 436 (parent who repeatedly refused reunification services and failed to appear in proceedings was not entitled to reunification services once he appeared).

C. [§3.9] WAIVER OF REQUIREMENT

A stipulation by the child's parent or Indian custodian or a failure to object may waive the requirement of active remedial efforts only if the court is satisfied that the party has been fully advised of the requirements of the ICWA and has knowingly, intelligently, and voluntarily waived them. Cal Rules of Ct 1439(i)(4), (m)(4); *In re Jennifer A.* (2002) 103 CA4th 692, 708, 127 CR2d 54.

D. [3.10] ACTIVE EFFORTS AND REASONABLE EFFORTS FINDINGS

The "active efforts" finding can be distinguished from the reasonable efforts finding in that the remedial and rehabilitative programs must consider the prevailing social and cultural conditions and way of life of the child's tribe. BIA Guidelines, D.2. All available resources should be used, including the extended family, the child's tribe, and Indian social services. See §3.14. Although the ICWA does not provide a standard of proof, case law as noted above provides that you must make the "active efforts" finding by clear and convincing evidence. *In re Michael G.* (1998) 63 CA4th 700, 712.

The finding in California law at a detention hearing when a child has been removed is "Upon review of the detention report, reasonable efforts have been made to prevent or eliminate the need for removal of the child from his or her home and these efforts have proved unsuccessful." This finding can be adapted in ICWA cases to, "Upon review of the case plan and court report, the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful." You must make both findings.

At subsequent review hearings up through the permanency hearing (the hearing where the court terminates reunification services and sets the .26 hearing) for as long as the child is in reunification, the "reasonable efforts" finding is, "Upon review of the case plan and court report, the agency has complied with the case plan by making reasonable efforts to make it possible for the child to safely return home and to complete whatever steps are necessary to finalize the

permanent placement of the child." This finding can be adapted in ICWA cases as, "Upon review of the case plan and court report, the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful." Again both findings must be made.

You are not required to make an "active efforts" finding at the .26 hearing, because the child's return to parental custody is no longer at issue, unless you failed to make the finding at the permanency hearing or the parent presents evidence of changed circumstances. *In re Mathew Z.* (2000) 80 CA4th 545, 554, 95 CR2d 343.

E. REVIEWING CASE PLANS

1. [3.11] Importance of Monitoring Case Plans Involving Indian Children

Part of your duty in periodically reviewing the status of every dependent and delinquent child in foster care is to monitor and review the case plan. This is so that you can determine the continuing need for and appropriateness of the placement and the agency's compliance with the case plan in making reasonable efforts to return the child home and concurrent planning for permanent placement. Welf & I C §§366(a)(1), 706.5, 706.6. This duty takes on added importance when the ICWA applies to the child because cultural considerations and the interests of the child's tribe must be accounted for in the case planning.

The key elements of the case plan for a child to which the ICWA applies and what you should be looking for are discussed below. A checklist of these elements that you can copy is provided in Appendix A.

> TIP: If you use the checklist each time an ICWA case comes before you, the social workers and probation officers will come to understand what your expectations are for an ICWA case plan, and your findings will be better supported by the evidence.

2. [3.12] Deadlines

The deadlines for preparation and updating of case plans do not change for a child subject to the ICWA. In general a case plan must be prepared within 30 days for dependency cases and 60 days for delinquency cases from removal from the home or by the date of the dispositional hearing, whichever occurs first. Welf & I C §§636.1, 16501.1(d). Although there is no legal consequence of failing to meet this deadline, it does delay the process of reunification and permanency planning.

You will receive a case plan and dispositional report at the time of the dispositional hearing. You will also receive updates to the case plan for each subsequent review hearing and permanency hearing. The case plan must be updated in conjunction with every court review hearing, permanency hearing, and termination of parental rights hearing, but no less frequently than every six months.

One additional element to look for in reviewing updates to the plan is that it has been revised to account for the changing needs for services of the child and the family. The developing relationship between the child, parent, and tribe may be one cause of changing needs. Welf & I C §§366(a)(1), 16501(d).

TIP: Check the date the child was removed from the home on the petition and make sure that the case plan was completed by the deadline. Alternatively, you may want to require that social services and probation include the date the child was removed from his or her parents or legal guardians on the face sheet of the court report so you do not need to look back to the petition.

3. [3.13] Process

Knowing about the process or method by which a case plan was created is particularly important in a case to which the ICWA applies. But because most case plans do not describe how the plan was developed, you will have to ask what method was used.

The main thing you are looking for is the participation of the child's tribe or Indian custodian in developing the plan. Even though the standard signature block does not have a place for a tribal representative or Indian custodian to sign off, you should see some indication that they participated in the process. Without that indication, you must ask about their participation in developing the plan, and if they were not included, get an explanation of why not.

The reason to ask about the method used in developing the plan is to help ensure the participation of the child's tribe and family in developing the plan. Such participation helps to ensure that the case plan is culturally appropriate. You will also be reviewing the cultural appropriateness of services when you review for services. See §3.14.

In California, the method used by most jurisdictions is some form of family group decision making. This method is particularly useful in ICWA cases, because it can foster relationships between the child, the family members, the social worker, the probation officer, and the child's tribe. It is through these relationships that communication, cooperation, and collaboration can lead to the formation of a successful case plan.

Although family decision making may look different from county to county, the key elements that you can listen for in the social worker's description are the following:

- All family and tribal members who wish to be present are invited;
- The family can invite nonfamily who are part of their support network;
- A professional convenes the meeting and encourages the family and tribe to meet as a team; the professional may leave the room at some point to give the family and tribe privacy to discuss the case;
- The job of the family and tribe is to make decisions to stabilize the family crisis and create a plan to ensure the child is safe and cared for;
- The family presents and explains their plan to the professionals, who have veto power—consensus can usually be reached; and
- You must ultimately decide whether to approve the plan.

The power of using family decision-making principles in developing a case plan is that it allows the parents, child, and tribe to work together to identify what the family may need to provide a safe home for the child and the services that will help the family stay together. The family, tribe, and other family support networks become active participants in developing the plan and invested in its success. The final plan is also more likely to be culturally appropriate because members of the child's family and tribe have contributed to it.

TIP: Some judicial officers who have worked with children and families to whom the ICWA applied have found that the case plans developed following family decision-making principles achieve better outcomes for children and families. If your county does not already use a family decision-making model, consider working with your court to meet with the child welfare director and chief probation officer to encourage them to use principles of family decision making in the development of plans for all families, not just families to whom the ICWA applies.

4. [3.14] Services

In ICWA cases, you must review the services that are and have been offered as documented in the case plan. You do this for two reasons: (1) to assure that the services offered are culturally appropriate and (2) to assure that the level of services offered meets the ICWA active-efforts requirement. See discussion at §§3.7, 3.8.

Some examples of general services that may be offered include transportation vouchers, visitation, medical and dental services (CHDP), and educational services for the child (nonpublic school or general curriculum). Examples of culturally appropriate services that may be offered include (1) tribal enrollment inquiries and following enrollment procedures for the child and family; (2) referrals to Indian Health Services for general medical and dental care, parenting classes and counseling or other mental health services; (3) referrals to Native American based substance abuse programs; (4) referrals to Native American placement agencies if the child has been removed from the home and cannot reside with family or be returned to the tribe; (5) referrals to a medicine person from the child's tribe or another tribe who is in the local area and can work with the family; (6) referral to and providing access to culturally appropriate events, for example, powwows, exhibits, lectures, classes, and other groups; and (7) referral to the local tribal CASA program.

TIP: A medicine person need not be from the child's tribe. However, those that have the "medicine person" title receive this designation from their tribe. Often Indian Health Services, an ICWA social worker, or the tribe can assist in making a referral to a medicine person. It is the financial responsibility of the county to absorb the cost of this service. However, if the county denies the request, the court may need to order that the county be financially responsible for the medicine person's services if it is deemed in the best interests of the child.

TIP: Even when a child has mental health needs that require residential treatment or hospitalization, it is still necessary for that child to receive culturally appropriate services. Native American agencies in your area or near the child's placement, such as Indian Health Services, usually have staff who can either go to the institution and provide such services or can provide transportation to cultural events or groups.

TIP: You should find a recitation of the reasonable and active efforts made by the agency both listed in the case plan and summarized in the court reports prepared for each hearing. Your job is to review and assess the agency's efforts and decide whether they meet the two standards of "reasonable" and "active" and are supported by clear and convincing evidence. Be sure to make two findings (see discussion at §§3.7, 3.8).

5. [3.15] Placement

An important part of reviewing the case plan when the ICWA applies is to be sure that any recommendation of foster care or preadoptive placement follows the statutory placement preference order (see discussion at §5.2) of the ICWA, unless you find good cause to not follow the preference order.

The placement preference provision applies to all placements, including those made by the agency before the initial hearing, those made by the court at detention, disposition and permanent placement, and any removal from a placement to another placement. So regardless of which hearing you are conducting, if placement is at issue or you are making any finding regarding the appropriateness of the placement or simply making a placement order for the first time in the case, you must check to make sure it adheres to the placement preferences under the Act.

The standard for evaluating whether a placement conforms to the placement preferences is the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties" (25 USC §1915(d)). It is not easy to follow this standard. The standard requires you to set aside your own values and judgments and view the case through the lens of the child's Indian community. Because an Indian home has only one single working parent, is overcrowded, or is impoverished is not necessarily a reason to disqualify the placement and skip the preference priority (see BIA Guidelines, F.1, Commentary, at 67594). This is why the process by which the agency arrives at its recommendation for placement and your role in probing the case planning process to find out if it was shaped with tribal input is so vitally important.

> TIP: The placement preferences in the Act help you put aside your own values and help to ensure that the Indian child is introduced into his or her Indian culture and is given the opportunity to meet people from his or her tribe who can serve as lifelong connections and provide a sense of belonging. The benefits are incalculable because making these connections could lead to life-altering spiritual, educational, and career opportunities.
>
> TIP: The Act does not distinguish between Indian and non-Indian extended family members. Both are preferred over stranger foster homes or institutional placements, such as group homes.

Three practical problems can arise in the placement review that may not be directly within your purview, but that you should be aware of. First is the licensing issue—is the home approved or licensed by the tribe? Second, what if the tribe has approved the home, but a criminal records check for all household members over the age of 18 reveals that the state would not have licensed the home without obtaining a criminal records exemption. Third, is the Indian foster family receiving the title IV-E money to which it is entitled?

As to the first two questions, under ICWA's full faith and credit provision (25 USC §1911(d)), tribally approved or licensed homes are entitled to treatment similar to foster homes licensed by the state. Without clear communication between the child's tribe and the social services and probation that a given home has been approved or licensed by the tribe and an awareness on the part of social services and probation that they must defer to the child's tribe's home approval or licensure determination, a child can linger unnecessarily in a non-Indian foster

or group home. The existence of the criminal conviction may be overlooked because the home was licensed by the tribe or, depending on the conviction, may be "good cause" to deviate from the placement preference.

The Indian foster family is entitled to federal foster care maintenance payments for caring for the child, but to receive these funds, the tribe must obtain them from the local county that receives them through the California Department of Social Services. Under Standard 24, you are encouraged to take a leadership role in convening meetings to address such systemic issues.

> TIP: Some judicial officers who have worked with ICWA cases recommend convening a meeting with representatives from social services, probation, and tribes in the area to understand what protocol will be followed by the tribe to let the court and the agency know that a given home has been approved or licensed. A meeting should also be held with representatives from social services, probation, tribes in the area, and the California Department of Social Services to help reach cooperative agreements on procedures for funding children in tribally approved or licensed homes.

6. [3.16] Visitation

The difference between a non-ICWA case plan and an ICWA case plan in terms of visitation is that the latter should include a section on visits between the child and his or her extended family members who belong to the child's tribe. The child's extended family is defined by the law or custom of the Indian child's tribe rather than state law (see 25 USC §1903(3)). You must ensure that the efforts of the social worker and the probation officer are thorough and diligent in locating and facilitating visits between the child and his or her extended family or tribe.

> TIP: You can ask the tribal representative or Indian custodian what the child's tribe's definition of "extended family" is and use that definition when reviewing the case plan section on visitation. This way you can ensure that each extended family member is identified and visits between the child and family member are described. The Indian child's family may not be limited to those individuals whom you consider actual relatives but more than likely will include many more individuals who are considered "extended family" in the eyes of the family and tribe and under tribal law.

Ensuring visits to tribal members may be more important for the Indian child than other children. The Indian child stands to gain a sense of heritage and belonging from these familial connections, which can also lead to potential placements and permanent families for the child if the child cannot safely be returned to the home of his or her parents or legal guardians.

> TIP: If you are a judicial officer hearing cases in an urban area of California, the Indian children under your jurisdiction very often have family from tribes outside of California, while if you are in a rural area, the children are more likely to have family from a tribe or multiple tribes located in that region. Local Native American agencies will often serve as a resource to help an Indian child connect with members from his or her tribe or tribes if they are outside of California.

All case plans have a section on visitation that includes a description of the visits between the child and the following persons: (1) noncustodial parents, (2) maternal and paternal grandparents, and (3) siblings. In addition, an ICWA case plan should include a section on visitation that addresses the following:

1. Does the child have access to extended family members from their tribe?
2. Does the child have access to members from their tribe?
3. Does the child have a tribal CASA, and if so, how often does he or she visit with the tribal CASA?

> TIP: Not all tribes have a tribal CASA program, but if one is available, try to appoint one, because this person will help the child attain knowledge of and a connection to the child's particular tribe by accessing cultural events and culturally appropriate services.

7. [3.17] Concurrent Planning Steps

In reviewing the case plan, you must look to see that concurrent planning (work toward reunification and simultaneously an alternative permanent plan should reunification efforts fail) is being done. Except in bypass cases (cases where you have ordered no reunification services under Welf I C §361.5(b) at disposition), the social worker or probation officer is required to conduct concurrent planning. Reviewing for concurrent planning in an ICWA case means that you are looking for involvement of the tribe or Indian custodian in the planning process. Regardless of whether the reunification effort succeeds or fails, you should see efforts with the child's tribe to maintain the child's ties to his or her tribe and cultural heritage in the concurrent planning.

To this end you must review the case plan with a view toward whether it includes: (1) objectives relating to the child's tribe and active efforts; (2) specific time-limited goals—small steps that can be achieved by the agency, family, and tribe; (3) activities that are culturally appropriate and designed to enable the safe return of the child to his or her parents or legal guardians; (4) activities designed to result in permanency for the child that take into account the tribe's customs and the tribal benefits to the child; and (5) a designation of who is responsible for carrying out the planned activities—agency, parents, tribal CASA or State CASA, child, or tribe.

Part of reviewing concurrent planning is evaluating the ICWA case plan objectives. The plan should document the following:

- General and culturally appropriate services to the family;
- Tribe's involvement;
- Reasonable and active efforts; and
- Full disclosure to the family and tribe of the two concurrent plans with the time frame by which the court will adopt a permanent plan for the child.

> TIP: When the case plan is submitted to you for your review, ask questions to make sure the objectives continue to make sense and are understood by the family and tribe. They may need to be adjusted depending on tribal input, the availability of culturally appropriate services, and the procedural posture of the case.

TIP: Before removing the Indian child from parental custody at disposition, the agency must show that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 USC §1912(e)) As this standard is less subjective than the "substantial danger" standard for non-ICWA cases when ordering out-of-home placement (see Welf I C §361(c)(1)) and failure to meet non-Indian family and community child-rearing standards will not support an order for placement, the steps the agency has taken to secure the testimony of a qualified expert witness will greatly assist you in making your determination.

8. [§3.18] Documenting Active Efforts

The case plan is where active and reasonable efforts to reunify the family are documented. It forms the framework for the child's care and treatment during the foster care placement and for the services to be provided to the family. The case plan should establish that active and reasonable efforts to reunify the family have been provided and that the social worker or probation officer have properly documented those efforts. See discussion at §§3.7, 3.8 of what services and activities may satisfy the active-efforts requirement.

TIP: Many judicial officers who seek to adhere to the spirit of the ICWA begin by reviewing the case plan. As noted above, part of what you are looking for in an ICWA case is whether the recommendations of services by the social worker or probation officer have been culturally specific to the Indian child's family. Although a qualified Indian expert witness is not required to assess the active efforts in case planning, such a witness can be helpful in illuminating tribal customs and traditions that could affect the decision as to whether active efforts have been made. Just as the child and parents must be given the opportunity to participate in the development of the case plan, to sign it, and to receive a copy, it is also good practice to involve the Indian custodian and tribe because they will be able to help with additional resources that can then support the court's finding of active efforts.

You must be satisfied that the agency has provided (1) reasonable efforts to prevent removal and (2) reasonable efforts to reunify the child with his or her family, as well as active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Without these two findings, the child, the child's parents, and the child's tribe have a valid argument at the detention, disposition, case review, and permanency hearings that reasonable and active efforts have not been made to reunify the child with his or her parents. Because the child's return to parental custody is no longer at issue at the hearing to terminate parental rights, these findings need not be made at the .26 hearing. Your oversight role in monitoring the agency's efforts and demanding that the provision of services meets these two statutory requirements will prevent significant delays in achieving permanency for the child. The efforts must be clearly documented and supported by clear and convincing evidence; failure to provide full services to which a family may be entitled can result in a reversal and delay in achieving permanency for the child. *In re Michael G.* (1998) 63 CA4th 700, 715, 74 CR2d 642 (parents received 10 months of services rather than the 12 months to which they were entitled; case reversed even though there was little hope of reunification).

VI. WHAT BURDEN OF PROOF APPLIES?

A. FOSTER CARE PLACEMENT

1. [§3.19] Clear and Convincing Evidence Required

The ICWA provides that a court may order an involuntary foster care placement only if it determines by clear and convincing evidence, including the testimony of qualified expert witnesses (see §3.23), that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC §1912(e).

> TIP: The following sample language can be used for detention, disposition, prepermanency reviews, and postpermanency review hearings if the child is placed in a planned permanent living arrangement to satisfy the clear and convincing evidence requirement, when including qualified expert witness testimony, and when making a finding of serious emotional and physical damage:
>
> The court finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent [*or legal guardian or Indian custodian*] is likely to result in serious emotional or physical danger to the child.

California has adopted this standard with respect to the foster care placement or establishment of a guardianship in a dependency or delinquency proceeding. See Cal Rules of Ct 1439(i), (j). A stipulation by the child's parent, Indian custodian, or tribe, or a failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the ICWA and has knowingly, intelligently, and voluntarily waived them. Cal Rules of Ct 1439(i)(2), (j)(2). A failure to meet non-Indian family and community child-rearing standards, or the existence of other behavior or conditions meeting the removal standards of Welf & I C §361, are insufficient to support an order for placement absent a finding that continued custody by the parent or Indian custodian is likely to cause serious emotional or physical damage to the child. Cal Rules of Ct 1439(i)(3), (j)(3).

2. [§3.20] Determining Whether Required Showing Has Been Met

The BIA guidelines note that evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the child. The evidence must also show the causal relationship between the conditions that exist and the damage that is likely to result. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.3(c).

A child may not be removed merely because there is someone else willing to raise the child who is likely to do a better job or because it would be in the child's best interest to live with someone else. A placement also cannot be ordered merely because the court finds that the parents are "unfit." A placement may be ordered only if it is shown that it is dangerous for the

child to remain with his or her present custodians. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.3 Commentary.

B. TERMINATING PARENTAL RIGHTS

1. [§3.21] Proof Beyond Reasonable Doubt Required

The ICWA provides that a court may order an involuntary termination of parental rights only if it determines, based on evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses (see §3.23), that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC §1912(f). See *In re Krystle D.* (1994) 30 CA4th 1778, 1798–1801, 37 CR2d 132 (finding burden was met based on evidence of mother's schizophrenia and alcoholism). This burden of proof applies even if the tribe has not intervened in the proceeding. *In re Riva M.* (1991) 235 CA3d 403, 410, 286 CR 592. The court may make this requisite finding by concluding that returning the child to the parent would be substantially detrimental. 235 CA3d at 411 (court's finding that father had failed to overcome problems that led to loss of custody—alcohol abuse, incarceration, and lack of stable employment and residence—was tantamount to finding danger of serious emotional or physical damage to child).

California has adopted this standard with respect to the termination of parental rights in a dependency or delinquency proceeding. See Cal Rules of Ct 1439(m). A stipulation by the child's parent or Indian custodian, or a failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the ICWA and has knowingly, intelligently, and voluntarily waived them. Cal Rules of Ct 1439(m)(2).

> TIP: The following sample language can be used for the permanency hearing when the court sets the .26 hearing to satisfy the beyond-a-reasonable-doubt evidence requirement, when including qualified expert witness testimony, and when making a finding of serious emotional and physical danger:
>
> The court finds by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical danger to the child.

2. [§3.22] Time for Determining Whether Burden Has Been Met

Because the ICWA is a federal law, it does not identify the particular California hearing at which the determination of *beyond a reasonable doubt* must be made. Based on the family-protective policies underlying the ICWA, however, it is reasonable to assume that the determination must be made when, or within a reasonable time before, the termination of parental rights decision is made. Otherwise, it would be possible for a court to terminate parental rights when the current circumstances do not show a return to the parent's custody would be detrimental to the child's well-being. *In re Matthew Z.* (2000) 80 CA4th 545, 552, 95 CR2d 343.

This does not mean, however, that the determination must be made simultaneously with the termination decision at the Welf & I C §366.26 hearing. 80 CA4th at 552. Instead, it makes sense for the court to make the determination at the final review hearing when the court decides on a

permanent plan because the findings made at the review hearing form the factual basis for the subsequent termination decision. 80 CA4th at 553–555. The court need not repeat this determination at the section 366.26 hearing, absent a showing of changed circumstances or that the period between the two hearings was substantially longer then 120 days. 80 CA4th at 553–555. If the court did not make the determination at the final review hearing and intends to terminate parental rights, then it must make the determination at the section 366.26 hearing. 80 CA4th at 555.

C. [§3.23] Qualified Expert Witnesses

Removal of an Indian child from his or her family must be based on competent testimony from one or more experts who are qualified to speak specifically to the issue of whether continued custody by the child's parents or Indian custodian is likely to result in serious physical or emotional damage to the child. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.4(a); Cal Rules of Ct 1439(a)(10). See also *In re Riva M.* (1991) 235 CA3d 403, 411 n5, 286 CR 593 (although 25 USC §1915(e) and (f) refer to "witnesses" (plural), statute only requires one expert witness).

Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings (see Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.4(b)):

- A member of the child's tribe who is recognized by the tribal community as being knowledgeable about tribal customs as they pertain to family organization and child-rearing practices.
- Any expert witness who has substantial experience in delivering child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child's tribe.
- A professional person who has substantial education and experience in the area of his or her specialty.

The Guidelines do not restrict expert opinion witnesses to those who combine whatever other expertise they have with an expertise in tribal culture and child-rearing practices. *In re Krystle D.* (1994) 30 CA4th 1778, 1802, 37 CR2d 132. Nothing in the ICWA or the Guidelines precludes the presentation of expert opinion evidence that is otherwise admissible under Evid C §801, merely because the witness does not have an expertise in Indian matters. 30 CA4th at 1802. Moreover, an expert need not have special knowledge of Indian life when cultural bias is clearly not indicated. *In re Riva M., supra,* 235 CA3d at 411 n5.

The court or any party may request the assistance of the child's tribe or the BIA in locating persons who are qualified to serve as expert witnesses. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §D.4(a).

Chapter 4

PROCEEDINGS AFTER NOTICE IN VOLUNTARY ADOPTION PROCEEDING

I. [§4.1] WHAT ARE THE REQUIREMENTS FOR CONSENT?

The ICWA specifies procedures that must be followed for a voluntary foster care placement, termination of parental rights, or adoptive placement. See 25 USC §1913.

A valid voluntary consent by a parent or Indian custodian to a foster care placement or a termination of parental rights must satisfy the following requirements (25 USC §1913(a)):

- The consent must be in writing;
- The consent must be recorded before a judge of a court of competent jurisdiction;
- The consent must be accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and fully understood by the parent or Indian custodian in English, or that it was interpreted in a language that the parent or Indian custodian understood; and
- The consent must be given more than ten days after the child's birth.

The consent need not be executed in open court when confidentiality is requested. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.1.

The consent must contain the child's name and birth date, the name of the child's tribe, any identifying number or other indication of the child's membership in the tribe, and the name and address of the consenting parent or Indian custodian. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.2(a). A consent to foster care placement must also contain the name and address of the person or entity arranging the placement, or the name and address of the prospective foster parents (if known). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.2(b). A consent to termination of parental rights or adoption must also contain the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to

be arranged. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.2(c).

The Judicial Council form (Adopt-225), Parent of Indian Child Agrees to End Parental Rights, must be used to secure the parent's consent.

II. MAY CONSENT BE WITHDRAWN?

A. [§4.2] FOSTER CARE PLACEMENT

A parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time. 25 USC §1913(b). Consent may be withdrawn by filing an instrument executed by the parent or custodian withdrawing the consent in the same court where the consent was filed. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.3. On withdrawal of consent, the child must be returned to the parent or Indian custodian. 25 USC §1913(b).

B. TERMINATION OF PARENTAL RIGHTS OR ADOPTIVE PLACEMENT

1. [§4.3] Before Entry of Final Decree of Adoption

In any voluntary proceeding for termination of parental rights to or an adoptive placement of an Indian child, a parent may withdraw his or her consent for any reason at any time before entry of a final decree of termination or adoption by filing with the court an instrument executed under oath by the parent stipulating his or her intention to withdraw consent. 25 USC §1913(c); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.4. See Fam C §8620(b) (Department of Social Services must advise parents of their right to withdraw consent). The clerk of the court must promptly give notice of the filing to the party by or through whom the preadoptive or adoptive placement was arranged, and this party must ensure that the child is returned to the parent as soon as practicable. 25 USC §1913(c); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §E.4.

2. [§4.4] After Entry of Final Decree of Adoption

After a final decree of adoption has been entered, a parent may withdraw consent to the adoption only on the grounds that consent was obtained through fraud or duress. 25 USC §1913(d). The parent may petition the court to vacate the decree. If the court finds that consent was obtained through fraud or duress, it must grant the petition and return the child to the parent. 25 USC §1913(d). An adoption that has been effective for two years or more may not be invalidated under this provision, unless otherwise permitted under state law. 25 USC §1913(d). In California, an action to vacate an adoption decree based on fraud may be brought at any time within three years after entry of the decree. Fam C §9102(b).

III. [§4.5] WHO MAY INTERVENE?

Under the ICWA, a child's Indian custodian and Indian tribe have the right to intervene at any point in a proceeding for the foster care placement of or termination of parental rights to the child. 25 USC §1911(c). This mandatory right of intervention does not distinguish between involuntary and voluntary proceedings.

Although the ICWA does not expressly grant the child's Indian tribe the right to intervene in a voluntary adoption proceeding, it also does not preclude intervention. *In re Baby Girl A.*

(1991) 230 CA3d 1611, 1618, 282 CR 105. As a matter of state law, parties with a sufficient interest may be permitted to intervene in an adoption proceeding. 230 CA3d at 1618–1619. Previously under this rule, a child's tribe was permitted to intervene. 230 CA3d at 1619 (tribe's interests under ICWA are sufficiently important to support intervention and its interests are not coextensive with child's interests).

But a tribe's right to intervene in an adoption proceeding is now recognized by statute. Family Code §8620(c) provides that if a child who is the subject of an adoption proceeding after being relinquished for adoption under Fam C §8700 is an Indian child, the child's tribe may intervene in the proceeding on behalf of a tribal member relative of the child. The tribe is encouraged to provide notice to the Department of Social Services at least five days before the hearing to determine whether a final adoption order will be granted, indicating whether it intends to intervene in the proceeding either on its own behalf or on behalf of a tribal member relative of the child. Fam C §8620(e).

IV. [§4.6] ARE POSTADOPTION CONTACT AGREEMENTS ALLOWED?

California's adoption laws may not be construed to prevent the adopting parents, the birth relatives (including the birth parent or parents), an Indian tribe, and the child from voluntarily entering into a written agreement to permit continuing contact between the tribe and the child, provided the court finds that the agreement has been entered into voluntarily and is in the child's best interest at the time the adoption petition is granted. Fam C §8620(f).

The terms of any postadoption contact agreement are limited to the following (Fam C §8616.5(b)(2)):

- Provisions for visitation between the child and a birth parent or parents and other birth relatives, including siblings, and the child's Indian tribe.
- Provisions for future contact between a birth parent or parents or other birth relatives, including siblings, or both, and the child or an adoptive parent, or both, and by the child's Indian tribe.
- Provisions for sharing information about the child in the future.

Unless the child has an existing relationship with the birth relative, the terms of the postadoption contact agreement must be limited to the sharing of information about the child. Fam C §8616.5(b)(3).

Chapter 5

STANDARDS AND PREFERENCES IN PLACEMENT OF INDIAN CHILD

I. [§5.1] IN GENERAL

The ICWA contains adoptive, foster care, and preadoptive placement preferences that apply in both voluntary and involuntary proceedings. 25 USC §1915. These provisions of the ICWA require courts (and state agencies) to consider those family and cultural characteristics that are peculiar to a tribal society and, if possible, to place an Indian child in an Indian community. See *Mississippi Band of Choctaw Indians v Holyfield* (1989) 490 US 30, 35–37, 109 S Ct 1597, 104 L Ed 2d 29. In *Mississippi Band of Choctaw Indians,* the U.S. Supreme Court held that the bonding of an Indian child to custodial figures other than the natural parents may not be used to avoid application of the ICWA, nor does it outweigh the tribe's interests in making custodial decisions. 490 US at 53–54. It noted that one of the most important substantive requirements imposed on state courts by the ICWA is that Indian children must be placed with Indian families, absent good cause for a different placement. 490 US at 36–37. See 25 USC §1915(a), (b).

II. WHAT PREFERENCES APPLY TO ADOPTIVE PLACEMENTS?

A. [§5.2] PLACEMENT PREFERENCES

In any adoptive placement of an Indian child, the court must give preference, in the absence of good cause to the contrary, to a placement with

- A member of the child's extended family,
- Other members of the child's tribe, or
- Other Indian families. 25 USC §1915(a); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.1(a); Cal Rules of Ct 1439(k)(2).

B. [§5.3] WHO ARE MEMBERS OF CHILD'S EXTENDED FAMILY?

The term "extended family member" is defined by the law or custom of the child's tribe. In the absence of such a law or custom, it means a person 18 years of age or older, who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 USC §1903(2); Cal Rules of Ct 1439(a)(7).

> TIP: Each tribe may define extended family differently, and the court must place the child according to the tribe's standards unless there is good cause to deviate from the preferences.

A de facto parent under California is included within the definition of "extended family member." *In re Brandon M.* (1997) 54 CA4th 1387, 1396–1400, 63 CR2d 671. A "de facto parent" is a person who has been found by the court to have assumed, on a day-to-day basis, the role of a parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed this role for a substantial period. Cal Rules of Ct 1401(a)(8).

C. [§5.4] OBLIGATIONS IMPOSED ON COURT AND SOCIAL SERVICES AGENCY

The court or social services agency should look to the extended family first when it becomes necessary to remove the child from the custody of his or her parents. Placement within the same tribe is preferable because of differences in cultures among tribes. Guidelines for State

Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.1 Commentary.

Unless a consenting parent requests anonymity, the court or agency must notify the child's extended family and the child's tribe that their members will be given preference in the adoption decision. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.1(c). The court or agency should make an active effort to discover if there are families entitled to preference who would be willing to adopt the child. However, the consenting parent's request for anonymity takes precedence over efforts to find a home for the child consistent with the ICWA's priorities. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.1 Commentary.

III. [§5.5] WHAT PREFERENCES APPLY TO FOSTER CARE OR PREADOPTIVE PLACEMENTS?

Any Indian child accepted for foster care or preadoptive placement must be placed in the least restrictive setting that most approximates a family and in which the child's special needs, if any, can be met. The child must also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. 25 USC §1915(b); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.2(a); Cal Rules of Ct 1439(k).

In any foster care or preadoptive placement, the court must give preference, in the absence of good cause to the contrary, to a placement with

- A member of the child's extended family (see §5.3);
- A foster home licensed, approved, or specified by the child's tribe, whether on or off the reservation;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs. 25 USC §1915(b); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.2(b); Cal Rules of Ct 1439(k)(1).

IV. WHAT CONSIDERATIONS APPLY IN MAKING PLACEMENTS?

A. [§5.6] CONSIDERATION OF TRIBE'S PREFERENCE

The child's tribe may establish a different order of preference by resolution. The agency or court making the placement must follow this order, as long as the placement is the least restrictive setting appropriate to the child's particular needs. 25 USC §1915(c); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §§F.1(b), F.2(c); Cal Rules of Ct 1439(k)(6). This provision of the ICWA does not, however, confer authority on the tribe to designate a specific placement. *In re Jullian B.* (2000) 82 CA4th 1337, 1345 n3, 99 CR2d 241.

B. [§5.7] CONSIDERATION OF SOCIAL AND CULTURAL STANDARDS

The standards to be applied in meeting the preference requirements of the ICWA are the prevailing social and cultural standards of the Indian community in which the child's parent or

extended family resides, or with which the parent or extended family maintains social and cultural ties. 25 USC §1915(d); Cal Rules of Ct 1439(k).

V. WHAT IS GOOD CAUSE FOR MODIFYING ORDER OF PREFERENCE?

A. [§5.8] "GOOD CAUSE" DEFINED

A court may modify the order of preference under the ICWA only for good cause, which may include the following:

- The child's or parent's preference in placement. 25 USC §1915(c); Cal Rules of Ct 1439(k)(7). See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.3 Commentary (wishes of an older child are important in making an effective placement).
- The child's extraordinary physical or emotional needs, as established by a qualified expert witness (see §3.23). See *In re Krystle D.* (1994) 30 CA4th 1778, 1806, 37 CR2d 132 (court properly concluded that family and tribal placement preferences of ICWA could not be met for special needs child).
- The unavailability of suitable families based on a diligent effort to identify families meeting the preference criteria. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.3(a); Cal Rules of Ct 1439(k)(4).

An Indian child may be placed in a non-Indian home only if the court finds that a suitable home could not be located after a diligent search. Cal Rules of Ct 1439(k)(3). A diligent attempt to find a suitable Indian family includes, at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs that have available placement resources. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.3 Commentary.

This "good cause" exception is intended to provide courts with flexibility in determining the placement of an Indian child. *In re Jullian B.* (2000) 82 CA4th 1337, 1346, 99 CR2d 241; *In re Alicia S.* (1998) 65 CA4th 79, 89, 76 CR2d 121. In determining "good cause," a court is not restricted to the considerations contained in the BIA Guidelines, which are listed above. *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 632, 641–643, 19 CR3d 155 (these Guidelines should be given important but not controlling significance). For example, a court may consider whether the disqualifying provisions of Welf & I C §361.4 apply. *In re Jullian B., supra*, 82 CA4th at 1347 (finding that goals of ICWA and provisions of Section 361.4 are not incompatible). If the prospective adoptive parent has a criminal conviction within the provisions of that section, or if the adoptive household includes such a person, good cause may exist to reject a placement preferred by the ICWA. 82 CA4th at 1347. See Welf & I C §361.4(f) (consideration of tribe's request for exemption from statute's application to allow placement of child into Indian home that would otherwise be barred by statute). Good cause to reject the ICWA's placement preferences may also exist when a different placement is necessary to place siblings together. See *Fresno County Dep't of Children & Family Servs. v Superior Court, supra*, 122 CA4th at 646–647 (involving placement of half sisters, one of whom was an Indian child, while other was not).

In general, "good cause" may include considerations affecting the child's best interests, such as whether the child has had any significant contacts with the tribe, the detriment to the

child from removal from his or her current placement, or the extent to which the child has bonded with a prospective adoptive family. *Crystal R. v Superior Court* (1997) 59 CA4th 703, 720, 69 CR2d 414. Good cause, however, cannot rely solely on a determination that deviating from the preferences would be in the child's best interest. *In re Alicia S., supra*, 65 CA4th at 128, citing *Matter of Custody of S.E.G.* (Minn 1994) 521 NW2d 357, 361–363. Additionally bonding may not be considered in determining good cause when flowing from a placement made in violation of ICWA. *In re Desiree F.* (2000) 83 CA4th 460, 476, 99 CR2d 688.

B. [§5.9] Burden of Establishing Good Cause

The burden of establishing good cause for the court to alter the preference order is on the party requesting a different order. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §F.3(b); Cal Rules of Ct 1439(k)(5); *Fresno County Dep't of Children & Family Servs. v Superior Court* (2004) 122 CA4th 626, 632, 19 CR3d 155. See *In re Liliana S.* (2004) 115 CA4th 585, 590, 10 CR3d 553 (there was abundant good cause to place child with paternal grandmother—who, while not an Indian, lived near tribe's reservation, worked there, and taught child about her tribal heritage—rather than with maternal great-grandmother who was tribal member but did not live on reservation, when both child and parents preferred placement with paternal grandmother, and her proximity to parents allowed for visitation and better chance for reunification); *In re Desiree F.* (2000) 83 CA4th 460, 476–477, 99 CR2d 688 (good cause to depart from ICWA placement preferences was not shown); *In re Alicia S.* (1998) 65 CA4th 79, 88, 76 CR2d 121 (dependent child's interests in permanence and stability may in some cases outweigh competing interests of parents and tribe).

VI. WHAT HAPPENS AFTER PLACEMENT

A. Record of Placement

1. [§5.10] Providing Secretary With Copy of Adoption Decree

On granting a decree of adoption of an Indian child, the court must provide the Secretary of the Interior with a copy of the decree and other information showing the child's name and tribal affiliation, the names and addresses of the biological parents, the names and addresses of the adoptive parents, and the agency that maintains the files and records regarding adoptive placements. 25 USC §1951; Cal Rules of Ct 1439(p).

2. [§5.11] Making Record of Placement Available to Secretary or Tribe

A record of each placement of an Indian child must be maintained by the state in which the placement was made, evidencing the efforts to comply with the order of preference specified by the ICWA. This record must be made available at any time on the request of the child's tribe or the Secretary of the Interior. 25 USC §1915(e).

The BIA Guidelines provide that the records should be made available to the child's tribe or the Secretary within seven days of a request for the records. At a minimum, the records should contain the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §G.4.

In California, records of placements of Indian children are maintained by the Department of Social Services in Sacramento.

B. CHANGE OF PLACEMENT

1. [§5.12] Removal of Child From Foster Care Placement

Whenever an Indian child is removed from a foster home or institution for the purpose of further foster care, or preadoptive or adoptive placement, the new placement must comply with the requirements of the ICWA, unless the child is being returned to the parent or Indian custodian from whose custody the child was originally removed. 25 USC §1916(b); Cal Rules of Ct 1439(o).

2. [§5.13] Petition for Return of Child

If a final adoption decree is vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights, the child's biological parent or prior Indian custodian may petition the court for the return of the child. 25 USC §1916(a); Cal Rules of Ct 1439(n)(2). The court must grant the petition unless it is shown in an involuntary proceeding that returning custody to the parent or custodian is not in the child's best interests. 25 USC §1916(a); Cal Rules of Ct 1439(n)(2)(A).

The BIA Guidelines provide that notice of a change in the child's status must be given to the child's biological parents or prior Indian custodian, either by the court or agency authorized by the court, informing them of their right to petition for return of the child. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §G.3(a). They may waive their right to notice by executing a written waiver that is filed with the court. This waiver may be revoked at any time by filing a written notice of revocation with the court; the notice of revocation does not affect any proceeding occurring before it is filed. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §G.3(b).

VII. [§5.14] MAY PROCEEDINGS BE INVALIDATED?

A child custody proceeding may be invalidated on a showing that it violated the provisions of the ICWA governing jurisdiction (25 USC §1911), involuntary custody proceedings (25 USC §1912), or voluntary custody proceedings (25 USC §1913). 25 USC §1914. The invalidation action may be brought by the Indian child, the parent or Indian custodian from whose custody the child was removed, or the child's tribe. 25 USC §1914; Cal Rules of Ct 1439(n).

The petition seeking invalidation of the custody proceeding may be filed in any court of competent jurisdiction. 25 USC §1914. See *Slone v Inyo County Juvenile Court* (1991) 230 CA3d 263, 269–270, 282 CR 126 (petition for review must be filed in appellate court; superior court cannot review juvenile court dependency proceedings).

If the Indian child is a dependent child of the juvenile court or the subject of a pending petition, the juvenile court is the only court of competent jurisdiction with the authority to hear the petition to invalidate the foster placement or the termination of parental rights. Cal Rules of Ct 1439(n)(1).

VIII. [§5.15] MAY ADOPTION INFORMATION BE RELEASED?

An Indian child who was adopted may, on reaching age 18, apply to the court that entered the final decree of adoption for the release of information about the tribal affiliation, if any, of his or her biological parents, and of any other information that may be necessary to protect any rights flowing from his or her tribal relationship. 25 USC §1917. This provision applies to

adoptions completed both before and after the effective date of the ICWA. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §G.2(b).

The adoptee may obtain the assistance of the BIA in establishing his or her tribal membership without breaching the confidentiality of the adoption record. See Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg 67584 (Nov. 26, 1979), §G.2(c).

The Department of Social Services requires parents who are relinquishing a child of Indian ancestry for adoption to provide sufficient information to the Department or adoption agency so that a certificate of degree of Indian blood (CDIB) can be obtained from the BIA. Fam C §8619. The CDIB becomes a permanent part of the adoption files, along with any other documents pertaining to Indian ancestry or tribal enrollment. This information must be made available to the adoptee on reaching age 18. Fam C §8619; 22 Cal Code Regs §35385(a).

APPENDIX

Checklist for Case Planning

Chart of Findings and Orders

Notice Checklist

Resources

Checklist for Case Planning

Deadline

☐ Case Plan: filed 60 days from the date of removal or disposition, whichever is earlier
☐ Case Plan Updates: filed 10 days before each status review and permanency planning hearing the date of initial removal or disposition, whichever is earlier

Process

What method? ☐ Team Decision Making ☐ Family Decision Making (also referred to as Family Group Conference, Family Unity Meetings) ☐ Other_____
Did the process?

- ☐ Engage child (if old enough), family, and tribe(s)
- ☐ Solicit input from child (if old enough), family, tribe(s)
- ☐ Incorporate input from the child (if old enough), family, tribe(s) into the case plan or case plan updates
- ☐ Signatures of child (if old enough), parents, tribe(s) or explanation if missing
- ☐ Help the child learn about his or her tribal background, customs, and culture and the benefits of tribal membership
- ☐ Result in identifying child's needs as an Indian child

Services

☐ Active Efforts to reunify
☐ Culturally appropriate

- Making enrollment inquiries and following any procedures to help enroll child and/or other family members in their tribes
- Referrals to Indian Health Services for general medical/dental care, parenting classes and counseling/mental health services
- If necessary, referrals to Native American based substance abuse programs
- Access to culturally appropriate events, such as Pow Wows, exhibits, lectures, classes, groups
- Referral to any local tribal CASA program or if there is not one, then to the local state CASA program
- Referrals to any school-based or after-school programs where children learn about their Indian cultural heritage
- Referrals to Indian Health Services for general medical/dental care and counseling/mental health services
- Access to a medicine person from the child's tribe(s) or other tribe in their local area to work with the family and/or child

Placement (if applicable) (section 1915(b))

☐ A description of the circumstances surrounding removal and placement in foster care
☐ Least restrictive setting that closely approximates his or her family and that is within a reasonable proximity to his or her home
☐ Consistent with placement preferences under ICWA

preference must be given, in the absence of good cause to the contrary, to a placement with-- member of child's extended family; foster home licensed/approved by child's tribe; Indian foster home licensed/approved by local social services agency; children's institution approved by the tribe or operated by an Indian organization

☐ Has the Indian child's tribe established a different order of placement preferences by tribal resolution

☐ An Indian foster home

☐ Is the type of placement best equipped to meet the child's needs taking into account the prevailing social and cultural conditions and way of life of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties?

☐ A description of the placement, including a discussion about the safety and appropriateness of the placement consistent with tribal customs and traditions

☐ Referrals to Native American placement agencies

☐ Proximity to child's tribe (on the reservation, closeby)

☐ Closeby to culturally appropriate services

☐ Qualified expert witness testimony

☐ Removal meets standard of proof: by clear and convincing evidence, the continued custody by the parent would likely result in serious emotional or physical damage to the child

<u>Visitation</u>

☐ Scheduled visits between the child and his or her family and tribe, setting forth frequency and duration, supervised or unsupervised or an explanation if no visits are made.

<u>Concurrent Planning Steps</u>

☐ Case plan objectives

☐ Specific time-limited goals

☐ Activities designed to enable the safe return of the child to his or her home

☐ Activities designed to result in permanent placement

☐ Specific responsibility for carrying out the planned activities

☐ A description of culturally appropriate services to assist in reunification and services to be provided concurrently to achieve legal permanency if efforts to reunify fail.

Chart of Findings and Orders

To be added

ICWA Notice Checklist

Applicability of ICWA (CRC 1439(b))

- ☐ **Determine applicability:** ICWA applies to:
  - ☐ All dependency proceedings under Welf & I C §300.
  - ☐ Any delinquency proceedings under Welf & I C §§601 and 602 in which the child is at risk of entering foster care or is in foster care.
  - ☐ Any voluntary adoption proceedings for relinquishment under Fam C §8700 or for execution of an adoption placement agreement under Fam C §8801.3, as well as some probate and legal guardianship proceedings.
- ☐ **Duty to inquire: S**ocial services agency or probation and the court have affirmative and continuing duty to conduct ICWA inquiries unless and until court decides ICWA does not apply.

Inquiry Procedure (CRC 1439(d)–(e))

- ☐ **By social worker:** Social worker in dependency case must ask child, if old enough, and parents or guardian whether child may be an Indian child or may have Indian ancestors.
- ☐ **By probation officer:** If probation officer in delinquency case believes child is at risk of entering foster care or is in foster care, officer must ask the child and parents if child is Indian or may have Indian ancestors.
- ☐ **First appearance:** At first appearance in any dependency case, or in any wardship proceedings in which child is at risk of entering foster care, order the parent or guardian to complete form JV-130, *Parental Notification of Indian Status*.
  - ☐ Also examine petition to see if box is checked that child may be a member or eligible for membership in a tribe, but petitions are often inaccurate. (See form JV-100, *Juvenile Dependency Petition (Version One)*, box 1(*l*); form JV-110, *Juvenile Dependency Petition (Version Two)*, box 1(i); form JV-600, *Juvenile Wardship Petition*, box 1(m).)
  - ☐ If petition only indicates that child may be of Indian ancestry, you must give notice to the BIA and make further inquiries about possible Indian status. (See form JV-100, box 1(m); form JV-110, box 1(j); form JV-600, box 1(n).)
  - ☐ Starting at the initial or detention hearing, determine what inquiries were made and what notices were sent.
    - ☐ If parents state they have Indian heritage, order appropriate notice, by return receipt, to be filed with the court by the jurisdiction hearing.
- ☐ **Minimal showing:** If you know or have any reason to know or suspect that the child may be an Indian child, *e.g.*, from information in the detention or screening summary or a completed form JV-130, proceed as if the child were an Indian child and **send notice**.

Notice Procedure (CRC 1439(f))

- ☐ Who receives notice: Ensure that notice is sent to:
  - ☐ Parents.
  - ☐ Indian custodian of an Indian child.
  - ☐ Indian child's tribe via the tribal chairperson unless the tribe has designated another agent for service.
  - ☐ All federally recognized tribes of which the child may be a member or eligible for membership (through either side of the family—maternal and paternal).
  - ☐ Area Director of the BIA if identity or location of the parent or Indian custodian or the tribe cannot be determined.
    - ☐ If BIA is noticed, BIA has 15 days after receipt to give requisite notice to tribes.
- ☐ **When is notice sent:** Whenever you have reason to believe the child may be an Indian child.
- ☐ Content of original notice: Ensure that the original notice contains the following:
  - ☐ Copy of the petition.
  - ☐ Form JV-135, *Notice of Involuntary Child Custody Proceedings for an Indian Child*, which includes, among other information, the following:
    - ☐ Child's name, birthdate, birthplace, and tribal affiliation.
    - ☐ Notice of the pending petition.
    - ☐ Date, time, and place of hearing.
    - ☐ Notice of rights of the tribe, parents, or Indian custodian to intervene in the proceedings and to request a continuance of up to 20 days to prepare.
    - ☐ Information about biological parents, grandparents, and great grandparents, both maternal and paternal.
  - ☐ For voluntary adoption proceeding, form ADOPT-226, *Notice of Voluntary Adoption Proceedings for an Indian Child*.
- ☐ **How is original notice served:** Ensure that notice was given by registered or certified mail with return receipt requested. Recommended that notice also be given by first class mail.
- ☐ **Subsequent notices:** After original notice is sent and a tribe has intervened, notices of subsequent hearings are given on the same forms used to notice other parties, and are served by first class mail.
- ☐ **Proof of service:** Verify that all proofs of notice and copies of notices sent and all return receipts and responses received ***are filed in the case file***.

I. SPECIFIC HEARINGS

- ☐ **Initial/Detention Hearing (Welf & I C §§290.1(c), 290.2(c)):**
  - ☐ If you know or have reason to know that child is Indian, verify that notice was given as soon as possible after the filing of the petition.
    - ☐ If Indian child in custody, clerk gives notice at least 5 days before hearing, or at least 24 hours if hearing was set to be heard in less than 5 days.
    - ☐ If Indian child not held in custody, clerk gives at least 10-days' notice, or mails notice at least 10 days before hearing to anyone who resides outside the county.
- ☐ **Jurisdiction/Disposition Hearings (Welf & I C §291(c)(3)):**
  - ☐ If you know or have reason to know that child is Indian, verify that clerk gave at least 10-days' notice whether or not child was detained.
- ☐ **Review Hearings (Welf & I C §§292(c), 293(c)):**
  - ☐ If you know or have reason to know that child is Indian, verify that notice was served no earlier than 30 days nor later than 15 days before the hearing.

- ☐ **Selection and Implementation/Termination Hearing (Welf & I C §294(c)(2)):**
  - ☐ If you know or have reason to know that child is Indian, verify that notice to Indian custodian and tribe was completed at least 10 days before hearing.
- ☐ **Postpermanency Planning Review Hearing (Welf & I C §295(c)):**
  - ☐ If you know or have reason to know that child is Indian, verify that notice was served no earlier than 30 days nor later than 15 days before the hearing.

Determination and Continuance (CRC 1412(i), 1439(f)–(h))

- ☐ **Determination of Indian status:** Tribes determine membership or eligibility.
  - ☐ If tribes were identified and noticed, or no tribe was identified and the BIA was noticed, and after a reasonable time following notice, but not less than 60 days, no determinative response is received from the tribes or the BIA, court may determine that ICWA does not apply unless further evidence is subsequently received.
- ☐ **Intervention:** Federally recognized tribe of an Indian child is entitled to intervene as a party. Tribe may appear by counsel or a tribe representative.
  - ☐ If tribe does not intervene, tribe may still participate in proceedings, and receive and have access to all information.
- ☐ **Continuance:** If ICWA applies, do not proceed at jurisdiction or later hearing until at least 10 days after those entitled to notice have received notice.
  - ☐ If requested, grant the parent, Indian custodian, or tribe a continuance of up to 20 days to prepare.

Resources

http:///www.calindian.org
California Indian Legal Services

http://www.childsworld.ca.gov/IndianChil_316.htm
California Department of Social Services

http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWAResources.htm
Judicial Council - Administrative Office of the Courts, Center for Families, Children and the Courts